BOSTON UNIVERSITY

COLLEGE of BUSINESS ADMINISTRATION

THESIS

The Operation of Price Maintenance Laws in the United States

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(A.B. Harvard College 1927)

submitted in partial fulfillment of
the requirements for the degree of

MASTER of BUSINESS ADMINISTRATION

1941

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Introduction

The merits of resale price maintenance have been debated in trade association journals for approximately 25 years. Only during the past decade has the problem become a practical issue under the label"Fair Trade." A producer is permitted under the "Fair Trade" acts to issue at his option resale price contracts to the dealers. Starting in 1931, the state legislatures enacted these Acts very slowly at first. With the passage in 1937 of the Miller-Tydings Amendment to the Sherman Anti-Trust Act, the issuance of resale price contracts was permitted between manufacturers and dealers in interstate commerce provided the respective states had legalized Fair Trade. A serious obstacle to Fair Trade was thereby removed and the other states capitulated so that today only four states (Missouri, Vermont, Delaware, Texas) and the District of Columbia have failed to pass a Fair Trade law.

Doubtful as to the results to be obtained, many industries have been reluctant to issue contracts, preferring to stand on the sidelines and watch the results in other fields. The manufacturers of drugs and toilet preparations have been particularly successful, in cooperation with the retail druggists, in utilizing and enforcing Fair Trade.

When the Miller-Tydings Amendment was enacted,

the whole subject received considerable attention, inasmuch as the President and several Governmental agencies were opposed to the bill. In general, however the powerful influence and lobbying of the National Association of Retail Druggists has kept open discussion confined to the trade papers. The average consumer knows little about the subject. "The individual who buys a tube of toothpaste or shaving cream assumes that the higher price, if he notices it, is attributable to increased cost of wages and other expenses. He accepts the price philosophically." (Barron's-January 9, 1939-p.28.) Of late, the Federal Trade Commission has been checking on the collusive practices of retailers. The report from the Commission on a detailed survey of the effects of Fair Trade is expected shortly. The Department of Justice has been threatening prosecution under the Sherman Act against retail dealers for collusion and coercion. The Assistant Attorney-General has recommended the repeal of the Miller-Tydings Amendment before the Hearing on Monopoly conducted by the Temporary National Economic Committee.

The National Association of Retail Druggists has just issued a Statement on the Fair Trade Laws and addressed a spirited challenge to the TNEC for adequate public hearings. It is all a bit disturbing to the layman who has

never really appreciated what Fair Trade means. With the confusion of the consumer in mind, this paper narrates briefly the development of Fair Trade and pictures the situation as the lines of battle are drawn in the approaching bitter fight centering on Federal approval of Fair Trade.

PART I

THE GROWTH OF PRICE MAINTENANCE SENTIMENT

Early Background

The rapid spread of legislation enacted the past few years pertaining to resale price maintenance marks a significant development in a controversy that had its beginning in the early years of the twentieth century. Harassed by vicious competitive practices, certain trade associations, notably those sponsored by the wholesale and retail druggists, have revitalized this movement so that state Fair Trade laws have spread across the country. Utilizing the now famous "non-signor clause" introduced in the California Statute, proponents have accomplished, by means of well-executed campaigns, successes much broader in application than originally anticipated. Currently backed by retailers seeking to protect their profit margin from competitive price cutting, resale price maintenance, in its origin was sponsored by producers and owners of trademarked merchandise seeking to preserve the good will of their products. The difficulties of operating such a policy in union with the far-flung distribution resulting from present day national advertising are much more numerous than the problems existing in the days when a producer's area was limited by the travels of his drummers.

In the latter part of the nineteenth century, the general store furnished the entire limited assortment of merchandise required by most communities. Most commodities

were sold in bulk and with branded merchandise not widely distributed, little price cutting was in evidence. With the growth in population, there was an increase in the quantity and variety of goods needed to meet the changing consumer demand. Retailers found it necessary to concentrate attention on a definite line of merchandise, with the result that grocery and drug stores were established to answer the need for specializing. In securing his supplies, the retailer in some fields purchased through the middleman who was only a commission merchant, but usually in most lines he placed his order with the wholesaler, who maintained a warehouse stock and furnished credit to the retailers. The manufacturers sold to the wholesaler, the wholesaler to the retailer, and the retailer to the consuming public. Compensation for the dealers under this method of distribution, was based on a series of markups resting on a uniform discount system. These discounts recognized the nature of the services performed by the respective dealers and protected the difference in price between the wholesaler, the retailer and the consumer. Producers and wholesalers were careful to avoid discrimination between their customers, and as the discount differential was preserved, there was little tendency towards severe price cutting. In those years when the general store met the requirements of the community, some manufacturers made it a practice to attach notices to their goods indicating the price at which the item was to be resold. Other producers

drew up more or less formal contracts with some of their dealers, partly on the assumption that a fixed retail price would offset possible pressure in their own prices, and partly because the producer of the goods was fundamentally still a craftsman with a pride in his product reaching to the point of final sale.

At the turn of the century, new trends became evident. Growth of competition was forcing the manufacturer to consider reductions in cost and similarly was inducing the alert and efficient retailer to seek means of reducing his expenses. When the dealer discovered that the solution of his problem was to be found in chain operation, quantity buying, and advertising, he learned that he was able to sell more goods at a lower price and make greater profit. This development in retailing aided the expansion of the department store which had become established in urban centers with the increase in population, and encouraged the growth of chain stores. Volume sales were a necessity for the profitable operation of these outlets and price cutting became a common practice to attract the desired volume. Commerce between the communities was developing. It was no longer considered so essential to protect the public against local monopolies and excessive prices, as commodities from other communities were beginning to furnish new competition to keep local producers in check. (1)

(1) Zorn and Feldman Business under the New Price Laws-Prentice-Hall (New York, 1937), p. 278

The sale of packaged merchandise, distributed under trademark protection and backed by good advertising programs, expanded rapidly after 1900. The broadest opportunity for employing the price cutting practice that was spreading, existed with these packaged trademarked goods. The housewife could recognize the bargain because the quality was standardized and the cut in price appealed to her sense of economy.

Opposition to the early price cutting tendencies soon developed. The older type retail dealers took the matter of price maintenance in hand and demanded that manufacturers back their suggested resale price program with a policy of refusing to sell to price cutters. The producers responded promptly. Price cuts were becoming so deep in the chain stores that many retailers were electing to sell goods with less competitive pressure. The effect of this course of action by the old line independents was noticeable to the manufacturers. These manufacturers had been accustomed to look upon the use of resale price maintenance as a privilege to which they were entitled. The device for effectuating this policy was the written contract with distributors, whereby the distributor agreed not to sell the merchandise below the indicated price.

Legal Confusions

Prior to 1911, a great majority of decisions in the district and circuit federal courts upheld the legality of resale price maintenance contracts applying to patented and copyrighted products and commodities prepared by secret process. (1) The validity of contracts for resale price maintenance as related to interstate commerce was considered in 1889 by the Supreme Court of the United States in the case of Fowle vs. Park, 131 U.S. 88. The product was a patent medicine, Balsam of Wild Cherry, for which the owner of the secret process sold the rights to manufacture and distribute in designated territories. The purchasers of the rights contracted to sell and maintain the price stipulated in the contract and the court sustained the validity of the contract. "The vendors", said the court, "were entitled to sell to the best advantage and in so doing to exercise their right----- to prevent competition between purchasers, and the purchasers were entitled to such protection as was reasonably necessary for their benefit----." But in 1911, the doctrines which had been advanced by the lower federal courts and the validity of such contracts were nullified by the decision of the U.S. Supreme Court in the case of Dr. Miles Medical Co. vs. Park and Sons Co. 220 U.S. 373.

The Miles Medical case was the first leading case on the subject of price maintenance and its provisions furnished precedence in the law until passage of the Miller-

(1) Weigel- The Fair Trade Acts- Foundation Press, Inc. (Chicago-1938),p.23

Tydings Act in 1937. Following the common practice of that time, the Miles Company required every wholesaler and retailer selling its products to be bound by contract not to resell below the specified price. The defendant was a wholesale druggist who, although knowing of the Miles business practice, refused to enter into a contract. Nevertheless, it successfully arranged to get a supply of the medicine which it sold at cut prices. Alleging the action of the Park company was to induce violation of contracts and to feature loss leader items, the Miles Company sought an injunction that was refused by the United States Supreme Court. The court declared that the contracts were void as a restraint on competition and as a restraint on the alienation of title to property owned by the dealers, both restraints being contrary to the public interest under the common law. The contention of the company that the contracts, in designating the dealers as "agents," effected an agency system was disallowed by the court which termed the "agents" as "contemplated purchasers, who buy to sell again."

Mr. Justice Hughes expressed the majority view of the court when he expresses in part as follows:-

> "And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstances whether they were produced by several manufacturers or by one, or whether they were

previously owned by one or many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

A dissenting opinion that has become one of his most famous was written by Mr. Justice Oliver Wendell Holmes. He said, in part:

"--I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless ground for interference is very clear. With regard to things like the latter (Dr. Mile's medicine), it seems to me that the point of most profitable returns marks the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged---; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

The majority opinion in the Dr. Miles case became the chief landmark in a long series of legal decisions against retail price fixing by contract, with this precedent influencing subsequent decisions. The manufacturers were forced, as a result, to seek new and legal ways of maintain-

ing retail prices at a desired level. However, between Federal Trade Commission orders and additional court decisions, possible ways to circumvent the legal restrictions were limited.

The first of the new methods employed by producers, embraced the "refusal to sell" practice. Notice was given to the retailer that goods were not to be sold below a "suggested" retail price. This notice was backed up by a refusal to sell to dealers who did not abide by the "suggestion". Use of this procedure was approved in 1919 by the U.S. Supreme Court in United States vs. Colgate and Co., 250 U.S. 300, in which case the Government attempted to extend the scope of the Miles decision. Indicted under the Sherman Act, the Colgate Company was accused, among other charges, of warning dealers that sales would not be made to those who cut prices, of investigating those who cut prices and placing their names upon black lists, of requesting offending dealers to maintain prices, and of selling only to dealers giving such assurances. The court ruled that no contract for price maintenance had been made and reaffirmed the right of a producer to exercise discretion as to the parties with whom he would deal. An analysis of the decision indicated that a trader had a right to refuse to sell to anyone in the future who had cut the suggested resale price and to announce his intention in advance when: (1)

(1) Haring: Retail Price Cutting and its Control by Manufacturers(Ronald-New York-1935), p.94

1. Each customer was dealt with separately.

2. No attempt at monopoly was concerned.

3. No agreement or combination, except making the maintenance of suggested resale prices an announced condition of obtaining future supplies, was involved or averred.

4. The distributor, once having obtained title to such goods, could dispose of them as he saw fit, the only penalty for cutting prices being a possible future inability to obtain more of the same company's goods.

The following excerpt is a good summary of the tenor of the decision:

> "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell."

The right of refusal to sell, despite its validity, was not a satisfactory method of controlling resale prices. By carrying this policy too far, the producer became liable for criminal prosecution. An unlawful agreement to maintain prices might be construed from the practice of resuming sales to a price-cutting dealer after he has promised that he will not so act in the future. Although the courts have

granted that the right of refusal to sell may be invoked against a price cutter, no practical steps to determine the source of supply of a price cutting dealer are permitted under the law. In addition, the willingness of distributors to cooperate in a price maintenance policy based only upon the right of refusal to sell could easily develop into an illegal restraint of trade.

Limitations were imposed upon the right of refusal to sell policy in 1921 when the Supreme Court held that the practices of the Beech-Nut Packing Co. arising from the system known as the "Beech-Nut Policy" were in violation of the anti-trust laws. The Beech-Nut Company had in operation a sales plan requiring purchasers of their products to agree to maintain the indicated resale prices. No sales were made to dealers who refused to make this agreement or who sold below the specified price. Circulars, price lists and letters indicating both the wholesale and retail price were issued and jobbers were asked to sell only to accounts that were to sell at the suggested prices. Symbols stamped upon cases enabled the company to determine the identity of the price cutters. Violations were reported by the dealers cooperating with the policy. An index of distributors considered to be undesirable was kept by the company, listing those who were found to have been selling below cost. Non-conforming dealers were dropped methodically.

Reinstatement of distributors who had been assigned to the black list was made only upon assurances that the price would be maintained thereafter.

The Federal Trade Commission argued the case before the Supreme Court, 257 U.S. 441. Declaring that the Company's plan went beyond the methods legalized in the Colgate's case as being legal for the producer, the court held that the practices were a violation of the Sherman Anti-Trust Law, in that the strict cooperation exacted by the company had the same effect as an enforceable contract to control resale prices. The opinion in part, reads:

> "The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it had been the purpose of all the anti-trust acts to maintain."

In sustaining the order of the Commission against the particular practices of the Beech-Nut policy, the court did declare that the Commission order was too broad in prohibiting the company from attempting to maintain resale prices "by any means." The court emphasized that the doctrine of the Colgate case could not be used to set up any general price maintenance plan, and indicated, also, that the Colgate case should not be interpreted as an approval of price maintenance contract. The selection of customers was still a legal right, but only as long as no

implications were involved in the selection. The alternate method of distribution that permitted control of the resale price together with the limited refusal to sell policy involved the agency relationship between producer and dealer. The existence of a genuine agency was a requisite, the goods in the dealer's hands having been shipped on consignment with the title still vested in the manufacturer. Title passed direct from the producer to the retail consumer, compensation to the dealer usually being in the form of commissions. The court was strict in its interpretation of the agency contract, particularly in cases related to questions of retail prices. No subterfuge or cloaking of a price maintenance plan under the guise of consignment shipments to agents was countenanced. Under such a plan, the manufacturer had numerous problems, such as dealing direct with retailers under individual contract. He also had to bear the financial burden of his private method of distribution, unable to make use of the regular channels. There had to be provisions for adequate records, permitting prompt checkup and contact with the dealers. The average manufacturer could not afford the maintenance of such a system with its additional burden of expense and its increased capital requirements.

Despite the difficulties encountered in the operation of the agency system, the larger manufacturers extended

its use. The government viewed this expansion with suspicion as a subterfuge to fix resale prices, believing many distributors were classed as agents or consignees when, in reality, they were purchasers who owned the merchandise. Because of this attitude it was no surprise then, that in 1927 the United States prosecuted the General Electric and Westinghouse companies (272 U.S. 476). The General Electric had a well defined agency system in operation with dealers and license agreements with other electrical manufacturers-all relating to electric light bulbs. Although not mentioned in the contracts, risks involving food, obsolescence, fire, price declines, inventory insurance, and taxes on dealers' consigned stock were borne by the producer. In answer to the government's allegation that this system of distribution was a device to fix resale prices, the Supreme Court gave legal endorsement to the electric companies' agency plan of distribution.

> "We are of the opinion, therefore, that there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act. The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust Law, by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to the consumer."

Most manufacturers, however, were not in a position to handle sales on the consignment basis. But on the other hand, there was no definite course open to producers for legal resale maintenance of their products. As a result of the Beech-Nut case they were in a quandary. The right of refusal to sell to resale price cutters was still legal and announcement of this intention in advance was permissible. The operation of this policy could be very successful until some action interpreted as cooperative between the manufacturer and the dealer could be proved or inferred. No legal decisions clarifying the situation had been rendered by the Supreme Court from the Beech-Nut decree in 1921 up to the enactment of the Miller-Tydings Act in 1937. The type of policy to be pursued rested upon the judgment of management and management hesitated to adopt any methods which directed its control of resale prices beyond the simple dealer selection method approved in the Colgate decision. It was not known how to legally secure information on price cutters, and in addition it was not certain that a price cutter could be reinstated if he changed his selling policy. In general, management avoided any practice involving the border line, confused legal phases surrounding this question of resale price maintenance. No course of action was effected which helped the situation. The Federal Trade Commission defended

its cease and desist orders before the respective Circuit Courts of Appeal on points involving variations of the issues previously discussed. But inasmuch as each circuit court is composed of different personnel and as such decisions were not final, the approval of a final authority was lacking.

The Twenties; Capper-Kelly Legislation

The early movement for resale price maintenance was a development to offset the spread of price cutting which plagued the manufacturers of patented and branded articles in the years before the World War. The American Fair Trade League was formed as a permanent organization for the purpose of creating interest and advocating recognition for price maintenance of both patented and trademarked merchandise. The league followed proposed legislation that affected these issues. Plans were not crystallized for shaping legislation on price maintenance until about the time Wilson took office in 1913. Congress was then concentrating upon questions related to the Federal Reserve System, the Federal Trade Commission, and the Clayton Act. When these measures had been disposed of, Congress was expected to consider the Stevens bill, sponsored by Congressman Stevens of New Hampshire to authorize resale price contracts in interstate commerce. Before the measure was considered, the World War altered the situation.

Price cutting practically disappeared during the war years and in the boom years 1919 and 1920 that followed. Shortage in goods made it difficult for stores to meet ordinary requirements so that there was little reason to continue to cut prices. The attention of the

manufacturers was diverted to newer questions by the general business activity resulting from the war.

Respite from price cutting was short lived. The depression of 1921 revived the practice and its use again became widespread. The chain store expanded repidly during the Twenties and the use of branded merchandise as price leaders in these outlets was one of the principal reasons that directed attention once more to the question of price maintenance. The area of coverage that was reached by the spread of the chain store was very broad, as indicated by the number of store outlets.

Growth of Chain Systems (1)

Year	Number of Chains	Stores
1900	700	4,500
1910	3,000	13,500
1920	9,400	49,200
1930	7,061	159,638

In general, this expansion was effected by the policy of maintaining lower prices than the independents. It was also true of the department store and the mail-order house, but the economy offered by these outlets was supplemented by the prestige, good quality, and variety of the particular unit. The chains emphasized price as the sole consideration.

(1) Zorn and Feldman--Business Under the New Price Laws (Prentice-Hall, New York-1937) p.8

These mass distributors were able to undersell competitors for several fundamental reasons. Sales methods featured limited service, with its cash and carry basis and lack of delivery costs permitting economies reflected in price. "Leader" selling offered for sale certain articles at a very low mark-up. Sales of these items were usually confined to widely advertised, branded articles which allowed price comparisons. Economies from the large scale operations of these distributors accounted for savings which could not be definitely measured, but which existed in direct purchasing, the combination of the wholesale and retail functions, and other features. In addition, the concentration of purchasing power among these mass retailers led to direct buying from producers, often at terms and prices made possible only by the superior bargaining position of the large outlets.

The result of this trend upon the independent retailer was important because of the effect on the price levels. Regular dealers were being undersold on a wide front, and in addition, there were deep price cuts on advertised brands featured as loss leaders. Unable to meet his competitors' prices, the ordinary retailer found that he was losing business. In addition, the public's acceptance of the chain store merchandise was increasing.

Various remedies were taken to meet the dislocations created in retailing, but none were effective because the programs were purely voluntary ones or concerted action conflicted with anti-trust laws.

During this period, the demand for price maintenance was now originating with retailers and the government was manifesting an interest in certain phases of the problem. The reason was to be found in the spread of the chain stores and the special concessions exacted by them in placing their orders direct with the producer. A strong anti-chain store sentiment had been growing steadily. Congressional action was iniated against price discrimination to correct what legislators termed the gross inequalities due to the ability of large retail organizations to get unusual concessions from manufacturers. The Federal Trade Commission was authorized by Congress in 1928 to make a detailed study of the effect of the growth of chain stores in the United States. During its investigation, the Commission published much information concerning the granting of special discounts to chain store organizations. It concluded in its "Final Report on the Chain Store Investigation" (1935) that prior to 1929 "the chains were enjoying an extensive growth based largely upon special price concessions from manufacturers." As a result of

legislative attacks and inquiries coupled with the findings of the Federal Trade Commission, proponents of anti-chain legislation have succeeded in enacting discriminatory tax measures and the Robinson-Patman Amendment (1936) to the Clayton Act prohibiting price discrimination unless justified by cost. These laws were efforts to attack the evils of price cutting from approaching others than those advocated in resale price maintenance.

The adherents of the price maintenance movement had secured the backing of Congressman Kelly from Pennsylvania and Senator Capper from Kansas for sponsoring legislation. The "Capper-Kelly Bill" was introduced annually and had been presented to each Congress from the World War up to 1931. There was little response to the measure and it was 1926 before there was sufficient sentiment to secure hearings. In 1928 there was a favorable report by the House Committee on Interstate and Foreign Commerce, but it was 1930 before the measure could be brought to a vote in the House. It died in the Senate and was never re-submitted.

The Capper-Kelly bill represented the attempt to clarify the situation arising from the decisions of the Supreme Court on price maintenance. Its purpose was to remove the restriction placed on a manufacturer by the Supreme Court's interpretation of the Sherman Anti-Trust

Act in the Beech-Nut case. The measure, continually revised to meet the new conditions under price cutting, was at no time contemplated as restrictive legislation. It provided that any manufacturer operating in open competition was permitted to amke a contract with retail dealers relating to retail price at which his product was to be sold. A manufacturer was not to be compelled to operate under its provisions. This bill, however, did not permit the producer to contract with the wholesaler and specify the retail price of the product to the consumer. For real effectiveness, therefore, if the bill had been finally enacted, the producer would have been forced to eliminate the wholesaler in the distribution of his goods.

There was active support for Capper-Kelly legislation among several groups, and there was equally determined opposition. There was no question but that this bill was directed at chain store price cutting tactics. In the opposition was recorded the chain store, the department store, and the dry goods store, for the enactment of this legislation would have nullified the benefits derived by these outlets from quantity buying. Manufacturers of strong national brands with heavy sales through the chains did not favor the bill, as it would accelerate the movement to private brands. With three-quarters of the chain and department stores opposed to this legisla-

tion, other major retail groups supported it. Replying to Federal Trade Commission inquiries in 1927, 94% of the wholesalers and 84% of the retailers were in favor of price control. (1). The growth of retail outlets appealing to the price conscious public indicated that the consumer was opposed to resale price maintenance and would have supported lower priced private brands if, by the passage of Capper-Kelly legislation, prices in the volume outlets had been raised. The consumers, however, had manifested little interest in this movement and had taken no concerted action in order to protect their interests. With the last of Capper-Kelly bills failing to reach enactment in 1931, no new federal measures were proposed until the "Fair Trade" laws had swept through the state legislature requiring the enactment of the Miller-Tydings Bill (1937). This law was an enabling act for effective application to interstate commerce. The failure to secure national legislation in 1930 marked the end of the manufacturers predominance in the fight to seek relief from the vicious price cutting on branded merchandise. The movement then became an issue with the distributors. Nation-wide legislation was enacted during the next decade which made price maintenance effective in most states.

(1) Haring, A., Retail Price Cutting--(Ronald-New York-1935) p.193

Part II

FAIR TRADE

Theory of Resale Price Maintenance

Resale price maintenance designates a marketing system by which the manufacturer of trademarked or branded merchandise established the resale price of his products. This practice is most common in the distribution of nationally known, well advertised brands and usually it is the price to be paid by the consumer that it is established by the manufacturer. It has been noted that the methods of producers to secure control of resale prices in interstate commerce were limited by the United States Supreme Court, so that in reality price maintenance could not be effectively administered. The independent druggists, harassed by uncontrolled price cutting and diminishing profits, initiated successful legislation in 1931 legalizing price maintenance for intra-state commerce in the state of California. In a comparatively few years this movement, definitely revitalized as a distributor issue under the caption "Fair Trade", was ratified by most of the state legislatures. The Miller-Tydings amendment to the Sherman Act which was passed in 1937, legalized in interstate commerce minimum price contracts drawn in accordance with the provisions of the respective laws. Under Fair Trade, the owner of a trade mark may set any minimum resale price that he desires, and the retailer is free to sell that merchandise to the public at the minimum

price or any price above the minimum.

Proponents of the Fair Trade acts emphasize that they are permissive in character, enabling the owner to protect his trademark or brand against unfair competition and to preserve the value of his good will. In order to appreciate the advantages of Fair Trade as advocated for the protection of good will, it is necessary to have an accurate conception of the term as applied to business. In reality it is the state of mind, the attitude, or the reaction to a business and its products. Weigel, in summary, declares that:

> "Good will is the friendly regard usually created by merit, reputation, attractiveness, and advertising, which attracts and holds customers to the benefit of a particular business entity or product."(1)

The control and encouragement of this intangible element in business is most rapidly secured by the use of symbols. Such symbols are the trademarks and brand names which identify products and which enable a firm to capitalize on the good will that exists for its products. Practically everything today is sold under trademark or brand names, for such symbols exist in all fields of business activity. Increased advertising with its expansion through radio has stimulated the efforts of manufacturers to tie in their products with the symbols associated with the company's good will. There is no disputing the fact that

(1) Weigel, The Fair Trade Acts (Foundation Press, Inc. Chicago, 1938) p. 13

one of the valuable assets of a business is the possession of such a symbol of good will that finds favor with the average consumer.

Good will is difficult to acquire and easy to lose. Price and price practices have direct influences upon good will. Frequently manufacturers set their own selling prices unsoundly, and by such unintelligent action destroy the good will enjoyed by the firm. Under the system of distribution existing in this country, the producer of trademarked and brand-named merchandise deals through independent agencies in reaching the consumer, with the producer, as seller, losing possession and ownership of his products. The producer must sell his goods before the final transfer to the consumer and by so doing he loses control over his commodity. However, the sale of the product is not a sale of the symbols which identify it, as decided by the Supreme Court:

> "The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with.---the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owners of the mark or brand is an assault upon the good will---."(1)

(1) Old Dearbon Distributing Co. v. Seagram Distillers Corporation: 200 U.S. 183

These arguments are assailed by the opponents of price maintenance. It is pointed out that brand items command a much higher price than similar merchandise without a brand name. The price difference is the charge required by the manufacturer as payment for the value of the good will existing in his brand name. The dealer is considered to have purchased the tangible article and the intangible good will attached to that article. Good will is seldom the result of the manufacturer's effort alone, for without the cooperation of the retailer who promotes a product by his own advertising and promotional activities, brand good will could be developed only with difficulty. It is therefore reasoned that brand good will is a joint creation (1). Dealers perform a valuable service in the process of distribution and this service includes investment in an inventory, work and expense for its maintenance, the making of goods accessible for purchasers, and the assumption of credit risks. The good will of the dealer is thus added to that of the manufacturer. It is created in part by his willingness to sell merchandise at lower prices than his competitors. If the retailer is not free to adjust his prices as conditions warrant, his good will may be damaged. But inasmuch as he has part interest in the good will of the products that he sells, the merchant connot be accused

(1) Walker, Q. Forrest- The Consumer and the "Fair Trade" Laws-(R.H.Macy & Co., Inc., New York)p.17

of attempting to destroy the good will of the manufacturers by use of "loss leaders."

The advocates of Fair Trade maintained that those dealers who cut the prices of branded merchandise on which standard resale prices had been advertised, took such action to attract customers for themselves. The impression would be created that all articles were sold at correspondingly low prices, but actually above average markups were supposed to have been made on the higher priced merchandise. This reasoning is not sound, however, for if the public will tolerate and accept overcharging when competition among retailers exists, then under a non-competitive system of prices with no public authority regulating contract prices in the public interest, the only check on overcharging is the limit to which the greed of the manufacturers will lead him.(1)

When price cutting exists, the majority of dealers were expected to lose interest in a product because they were unable to get business at the regular price, the consumer was misled by price variance, the product was cheapened in the eyes of the public, and the good will connected with the article was seriously damaged. Those few dealers who thus traded upon a brand name which did not belong to them, inflicted damage upon all persons who had a property or trade right in that mer-

)1) Walker, Q. Forrest--The Consumer and "Fair Trade"Laws (R.H.Macy & Co., New York) p.17

chandise. It is interesting to emphasize at this point that the outspoken endorsers of the Fair Trade movement were the retail druggists. Despite the interest of this group in the preservation of the producer's good will and the trade name of his products, it would seem that their chief concern was the loss of the profitable sales of that product as a sequel to price cutting by competitors.

The manufacturers that supported the drive for Fair Trade visualized greater profits from increased sales volume. Some gave lip service only to the movement, while others were hesitant over making an open declaration of policy. These producers either feared that the spread of private brands would jeopardize their own products once that minimum prices were established, or they were unable to visualize what the effect of fixed resale prices would be in their particular trade. Many drug and sundry manufacturers cooperated in the national campaign backed by the retail druggists in an attempt to insure future profits. By preventing the price cutter from using his product as a leader, the good will of other vendors is protected and the manufacturer's plan of distribution is not disturbed. Loss of consumer good will by price cutting is usually the result of inability to buy at the bargain price. Newspaper advertisements may feature items which are sold at lower prices intown than

are available in suburbs or in the country. The consumer decides his local dealer is a profiteer and purchases a substitute for the article advertised at cut-rate. This manufacturer reasons that such public reaction to the price cutting of his product is detrimental to his interest and believes that Fair Trade will be an aid to increased volume. He will then benefit by the promotional assistance of dealers who would otherwise sell only to meet demand or entirely discontinue the cut-priced product.

The wholesaler expected to benefit by Fair Trade and assisted in spreading the doctrine in the different states. He anticipated a larger sales volume from the small retailer whom he supplied, as sales would be diverted from the large retail outlets that were buying direct. If such a shift in distribution occurred the position of the wholesaler would be strengthened. In addition, it was expected that with minimum prices effective, the pressure by retailers for cut-rate wholesale prices would be relaxed. It was even hoped that minimum wholesale prices would be set under Fair Trade.

The principal beneficiary of resale price maintenance as it was planned, and as it now operates, was the retailer. This is true, however, chiefly in drugs, cosmetics, proprietary remedies, toilet preparations, books, liquor, gasoline and a few other lines in which

Fair Trade has been applied. The neighborhood retailer is enabled to develop his store and advertise his prices without being immediatelyundersold by a cut-rate outlet which will entice the neighborhood consumer to less convenient locations. This situation will apply only for trademarked goods, for the price cutter is still able to sell less expensive merchandise and in addition competition from private brands will become more acute. It is claimed by proponents of Fair Trade that the consumer is a beneficiary of price reductions resulting from the establishment of minimum prices. Opponents firmly maintain that increased prices are the result of resale price fixing and that the consumer pays the entire bill. Data in support of these contentions will be discussed in a later section but it is proper to state at this point that the great majority of the public is paying more in higher prices for drugs and related merchandise as a result of the enforcement of Fair Trade. It is true that a purchaser now can be satisfied with the price he pays, knowing that another retailer cannot be selling the same article at a lower price. The average consumer, however, knows little about resale price maintenance and only recently has begun to appreciate his position in this movement.

The opponents of the Fair Trade Acts advance well reasoned arguments against the extension of the

movement. Some manufacturers avoided the issue at the start, afraid that as the plan developed they would lose control of the retail price for their own product. It was also pointed out that strong advertising campaigns would overcome any loss in good will arising from price cutting and force the dealers to stock in order to meet the demand. The cigarette companies met the problem in this way. Furthermore, Fair Trade would make difficult the introduction of new, possibly improved products that would be in competition with established brands. Previously, retailers favored new merchandise that sold at a fair margin of profit and would promote such brands in place of the well-known items that had been subject to price cutting. With minimum prices established, the margin of profit is more satisfactory to the retailer and there will be less incentive for him in promoting untested merchandise. Under Fair Trade, the owner would be required to spend large sums for promotional purposes, with dealer cooperation uncertain, and the chances for success being less than formerly. The wholesaler may not benefit as much as anticipated from fixed prices. The manufacturer will be anxious primarily to satisfy the retailer who influences the consumer at the final point of sale. If the owner of a brand has the good will of the retailer and the consumer, the wholesaler merely is required to fill the order for

for goods demanded by the retailer. The resale price will be set to meet the approval of the retailer and the wholesaler's margin may only be a secondary consideration. The extension of cooperative buying can be expected to continue to the detriment of the independent wholesaler, for under Fair Trade the independent may not share his profit margin with the retailer. The reaction of the consumer, retailer, wholesaler, and manufacturer to resale price maintenance at the time when the practice was illegal is found in the Federal Trade Commission's report entitled "Resale Price Maintenance" which was submitted to Congress in 1929, (1). The research of the Commission was based upon a detailed questionaire which secured from interested groups the individual opinions relative to the advantages and disadvantages resulting from the control of retail prices. During the past decade when the Fair Trade Acts were being enacted by the respective state legislatures, this report furnished pertinent information on many phases of the practice which had to be condidered. In his study of Fair Trade in the state of Michigan, E.H.Gault has summarized the principal reactions to this movement as indicated by the Commission's investigation.

Consumer's Attitudes Toward Resale Price Maintenance

The consumer was opposed to legalized control of

(1) Federal Trade Commission, Resale Price Maintenance (U.S.Gov't Printing Office, Washingyon 1929) Document No.546 Part I

resale price fixing in ratio of 3 to 1.

Advantages listed by consumers: (1)

Standardized price
Standardized quality
Reduced prices

Disadvantages listed by consumers: (2)

Higher prices
Elimination of competition
Monopoly and monopoly profit
Elimination of bargain sales
Class legislation and undue protection to the manufacturer with none to the consumer
Interference with consumer and dealer's personal or property rights
Lack of advantage in paying cash, or gain from cash and carry
Creation of trusts and mergers
Law unconstitutional, un-American, or economically unsound
Lack of advantage from large purchases
Loss of bargaining power of consumer
Less incentive for better merchandise methods
Combination of manufacturers to divide market or raise prices
Lower quality of goods
Too great a profit to retailers

Additional advantages to the consumer as indicated by the manufacturers and retailers: (3)

Reduction of substitution on the part of the retailer
Wider distribution for nationally branded merchandise
Better service from retailers
Greater confidence in merchant
Increased trading near home
Purchases of goods only as needed
Restriction of competition to quality and service
Elimination of shopping around

(1) Gault, E.H. Fair Trade (University of Michigan Business Studies IX - No. 2 1939) p.12
(2) Ibid, p. 13
(3) Ibid, p. 13

Less than one per cent of the consumers listed the advantages to be secured by resale price maintenance which were indicated by the manufacturers and retailers. The consumer has associated this movement with monopolistic practices, always considered by him as detrimental to his interests. The ordinary consumer has given little thought to the problem and has never been organized to fully understand its possibilities. The business men, on the other hand, have given much consideration to the entire question.

Manufacturers' Attitudes Toward Resale Price Maintenance

Advantages listed by manufacturers: (1)

Standardization of prices and margins
Stabilization of production and distribution
Standardization of quality
More profitable marketing
Fairer prices
Better cooperation of dealers
Facilitation of distribution
More dependable distributors
Increased volume of sales
Greater confidence in business
Less overstocking of merchandise

Approximately 72 per cent were recorded in favor of price maintenance.

Wholesalers' Attitudes Toward Resale Price Maintenance: (2)

The wholesalers were practically unanimous in favor of price maintenance legislation. They did not however, record possible advantages to themselves, but the manufacturers

(1) Ibid, p. 14
(2) Ibid, p. 15

and retailers submitted the following possibilities:

Stabilization of distribution
Assurance of legitimate profit
Standardization of prices and margins
Elimination of risk
Increased volume of sales
Facilitation in selling
Promotion of cooperation with manufacturers
Prevention of price cutting
Prevention of unfair competition
Better service on trademarked articles
Prevention of rebates
Prevention of substitution
Reduction of stocks

Retailers' Attitudes Toward Resale Price Maintenance

Advantages listed by retailers:

Legitimate or larger profit
Assurance of less price cutting
Competitive equality among retailers
No unfair competition
Stabilization of the market
Prevention of substitution
Greater confidence of consumers
Protection from chain and mail order price cutting
Increased volume of business
Less inventory
Assurance of quality merchandise at fair price
Lower dealer mortality
Elimination of competition
Increased number of dealers

Disadvantages listed by retailers: (2)

Price determination by manufacturers
Less independence
Less profit
More difficulty in disposal of surplus stocks
Elimination of quantity discounts

(1) Ibid, p. 15
(2) Ibid, p. 16

Mostly department and chain stores were among the 8 per cent who found any disadvantages.

The advantages and disadvantages reported above were conclusions reached in 1927 and 1928 when practical methods of resale price maintenance had not been attempted on a broad scale. The same arguments pro and con were advanced for Fair Trade and the Miller-Tydings bill (1937). The government as represented by the Department of Justice and the Federal Trade Commission, has never given itsapproval to the control of resale prices by contract. In considering the practical application as effective in 44 states, it will be evident that most of the anticipated benefits and objections are overshadowed by the publicized issues of dealer coercion, the comparable levels of retail prices before and after Fair Trade, possible collusion in price setting, and the expansion of private brands.

State Fair Trade Legislation

The state laws which were enacted to legalize resale price contracts were at first referred to as the "Little Capper-Kelly Bills" because of resemblance to the measures which had been regularly proposed to Congress but never accepted. The movement became so powerful among the states that it soon was identified only by its legal caption "Fair Trade." As explained by E.H. Gault, resale price maintenance is a general term applying to any control over price thatmay be exercised by parties who do not have the legal title to the merchandise whose price is controlled. "Fair Trade is the peculiar type of resale price maintenance which we have in the United States at the present time."(1)

The California Fair Trade Act of 1931 was the first state legislation of this type and attracted much attention. Where the last Capper-Kelly bill excluded many items on which there had been a demand for price maintenance (such necessities of life as meat and meat products, flour and flour products, agricultural implements, tools of trade, canned fruit and vegetables, all clothing, shoes and hats), this law legalized resale price contracts on all trademarked or branded goods. It also omitted the clause in the Capper-Kelly bill which would

(1) Gault, E. H. Fair Trade (Michigan Business Studies IX- No. 2 - 1939) p. 16

have granted the vendee the right to cut prices to a level 20% above his merchandise cost. The object of the act was stated to be the protection of trade mark owners, producers, distributors, and the public against "injurious and uneconomic practices" in distribution. It declared that no contract relating to the sale or resale of a commodity (a) identified by trade marks, brands, or names and (b) in fair and open competition with other commodities of the same general class, shall be considered in violation of any California law by reason of these provisions:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendee.

It is essential to note that the 1931 statute declared the legality only of such contracts as <u>between the signing parties.</u>

This California law, however, proved to be a boomerang to the organized retail druggists who sponsored its enactment. For some time they had been victims of "loss leader" practices by the chains and cut rate organizations, and they expected that the enactment of this measure would solve the problem. Most of the druggists signed the price maintenance contracts willingly, but the cut

rate druggists refused to cooperate. When the manufacturer declared he would not sell to the price cutter without a contract, the cut rate dealer proceeded to get his merchandise stock from other sources, usually from out-of-state wholesalers. The druggists' associations were able to induce manufacturers to incorporate in California in order to qualify for the issuance of contracts under the Fair Trade Act. The net result of the new legislation was that the cut rate "pine-board" outlets were in a better position than they had ever been. (The "pine-boards" were so named as the furnishings of these low cost outlets were constructed from pineboard packing boxes). They were getting supplies from out-of-state and were free to sell at prices of their own choosing, as the merchandise was acquired with no commitments as to price under the California law. The regular druggists and chains were bound by contracts under the law to maintain the established prices, and to meet the cut prices meant a violation of contract. The stabilization in prices that had been anticipated was not realized under the existing statute.

The inadequacy of the 1931 law in curbing the vicious price cutting which had been the vogue in California was discouraging to the business men. Despite all efforts to prevent it, the dealers who featured this type of

merchandising practice and who refused to sign price maintenance contracts, were still able to obtain elsewhere stocks of goods that were covered by contract if acquired within the state. At a luncheon meeting and conference held in Los Angeles in early 1933, business executives and trade association leaders pointed out the weakness of the statute as it was being applied and sought the advice of an eastern attorney who was present, Mr. Edward S. Rogers. His suggestion was a sixty-five word sentence which on August 21, 1933 became Section 1½ of the California Fair Trade Act. That sentence read as follows:

> "Wilfully and knowingly, offering for sale of selling any commodity at less than the price stipulated in any contract entered into pursuant of Section 1 of the Act, whether the person so advertising, offering for sale or selling is or is not a party to such a contract, is unfair competition and is actionable at the suit of any person damaged thereby."

This portion of the California law constitutes the celebrated "non-signers" clause. Its provisions were incorporated into the laws of the other states and its effectiveness stimulated the spread of Fair Trade throughout the country. At first, however, it did not attract the attention that its significance deserved because of new possibilities under the National Recovery Act.

N.R.A. legislation had afforded some temporary relief in price cutting. Its application had been set

[illegible]

[illegible]

[illegible]

[illegible]

up in most cases on a functional basis with separate code authorities covering the manufacturer, wholesaler and the retailer. The bitter fights which had been waged between the independents and the chain outlets were carried into N.R.A. and continued during its existence. This was due to the efforts to use the code structure to preserve the traditional channels of distribution, while the chains and mail order houses fought to preserve their direct buying policies. In general, little control of distribution was acquired either under the manufacturers' or under the wholesalers' codes. In the retail field some success was realized because the National Industrial Recovery Board specifically approved, as a matter of policy, restrictions on loss leader selling. Many trade groups, disappointed in N.R.A. had started to consider legislation for their particular problems even before the Supreme Court ruled it unconstitutional. Following the abandonment of N.R.A. price wars were again prevalent, spurring on the efforts for a more lasting solution.

The retail druggists learned valuable lessons from the experience under N.R.A. In developing the code and conforming to the provisions, the trade associations learned the value of cooperation. The members who drafted the code in reality prepared the ground work for the nation-wide drive to duplicate the revised California

statute. The National Association of Retail Druggists (hereafter referred to as N.A.R.D.) had been designated to administer its code during N.R.A. and through its state associations had become a dominant national power in retail distribution. With the end of N.R.A., this organization took command of the Fair Trade drive and utilized all its power and influence to facilitate its enactment by the different states, with the result that today only the District of Columbia and four states, namely, Texas, Missouri, Delaware, and Vermont, have failed to enact a Fair Trade law.

All of the laws on the statute books follow either one or the other of two models - the California Fair Trade Act as amended in 1933 to include the "non-signers" clause or the model law recommended by the N.A.R.D. in early 1937. The druggists model law was intended to clarify certain doubtful points in the older law and to eliminate several loopholes that had been detected, making four significant changes:

1. The California statute provided that the buyer shall not resell "except at the price stipulated by the vendor." The N.A.R.D. model law changed this phrase to read "at less than the price stipulated by the seller". This protected a dealer from liability for charging more than the contract minimum price. Ordinarily competition on standard articles offered under contract would keep the

price uniform. At times a dealer would be desirous of substituting another article, in which case he would raise the price on the standard article to facilitate sales on the substitute.

2. The N.A.R.D. model law contained provisions outlawing the granting of any concessions which were the equivalent of price cutting. This would include premiums, coupons and combination sales.

3. Both laws provided exemptions from the stipulated price in the case of closed out stock, damaged goods, and sales under orders of the court. The N.A.R.D. model law contains an added provision that the distributor or producer must be given notice in the case of a clearance sale, with opportunity to that supplier to purchase the stock at its original invoice price.

4. The N.A.R.D. model contains a specific provision prohibiting the establishment of a contract price except by the owner of the trade mark. The wholesaler is thus bound to sell only to retailers observing the stipulated price. Previously the wholesalers had been issuing the so-called "omnibus" contracts which included items whose retail prices they had not been authorized to establish by the manufacturer.

The Fair Trade Acts were soon being contested in the courts. To enact legislation is only a part of the

problem; to defend and direct the test cases to a successful conclusion is a more important phase of the problem. The first important case was instituted in Los Angeles, Max Factor & Co., a manufacturer of cosmetics, against C.G. Kunsman, a Los Angeles retailer. The complaint charged wilful selling of the manufacturer's product at less than contract price. The decision was handed down on October 18, 1933, declaring the law unconstitutional and permitting Kunsman to continue to cut prices.

> "When the defendant purchased merchandise manufactured by plaintiffs, whether he purchased from plaintiffs or from jobber or wholesalers, he acquired title thereto, and thereupon plaintiffs' title terminated and their control ceased ---." Section $1\frac{1}{2}$ of the law was held to be in violation of the Constitution of the United States and of the Constitution of California "in that it deprives persons of their property without due process of law and without compensation it abridges the privileges and immunities of citizens, it deprives them of the full and free use of their property ---".

Shortly thereafter on January 24, 1934, the San Francisco Superior Court handed down an opposite opinion in the first decision to uphold the constitutionality of Section $1\frac{1}{2}$. The statute was held to be a proper exercise of the police power of the state in protecting good will symbolized by trade-marks, brands, and names.

> "---Plaintiff's complaint reveals that the value of these identifying marks has been established by a course, over a period of years, of manufacturing articles of merit, selling them at reasonable prices, and exten-

> sively advertising them. The whole process is interlocking ---- and the ability to offer the products to the public at reasonable prices, nationally advertised, depends upon volume, production, and distribution. For a retailer, or anyone else to destroy the benefits of this system of business by cheapening the product in the public mind --- seems inequitable as a matter of fact, and a statutory declaration having the effect of declaring it unfair competition is within the province of the State Legislature."

In November 1935, the Feld-Crawford Act for New York, identical with the California Fair Trade Act, was held unconstitutional in a test case brought by Doubleday, Doran and Co. against R.H. Macy & Co. The highest court in the state, the New York Court of Appeals, passed on the case on January 7, 1936 and unanimously declared the "non-signers" clause was unconstitutional. Fair Trade boosters were in a quandary for there was no right of appeal from the New York decision to the U.S. Supreme Court. However, in February 1936, the California Supreme Court declared the state law to be constitutional and in June 1936, the Illinois Supreme Court unanimously affirmed the constitutionality of the Illinois statute. Inasmuch as the right of appeal exists in the case of an affirmative decision on a point in federal law by a State Supreme Court, both of these decisions were appealed by contestants to the U.S. Supreme Court. Advocates and opponents of Fair Trade focused attention on Washington as trade associations reflected the interest throughout the country. On December 7, 1936,

the "non-signor" clauses of the California and Illinois Fair Trade Acts were declared to be constitutional. The Old Dearborn Distributing Co. v. Seagrams Distillers Corporation (299 U.S. 183) was the principal case on which the Supreme Court passed judgment. The Supreme Court reversed all precedents and held unanimously that the "non-signers" clause in the Fair Trade laws was valid and constitutional. The court recognized a diversity of opinion as to the effects of price cutting upon the general public, and not being required to rule these facts, purposely left the question open to differences of opinion. The final step in the long series of court actions to establish the constitutionality of the "non-signers" clause was culminated on March 9, 1937. On that occasion the New York Court of Appeals reversed the earlier decision which was adverse to Fair Trade and in support of the argument advanced by R.H. Macy against Doubleday and Doran and Company. The court considered it to be its duty to submit its judgment "to the rulings of the Supreme Court on the Constitution of the United States and the interpretation of its own decisions". (1) Thus the legal restrictions in the largest retail market in the country were removed and with no obstruction visible, N.A.R.D. had a clear track with its Fair Trade movement among the states.

(1) Bourgois Sales Corporation v. Dorfman, Court of appeals of New York, March 9, 1937

The Dominance of the National Association of the Retail Druggists in the Fair Trade Movement

The independent retail druggists have been well organized into state trade associations, welded together by the aggressive national organization. Alert to the problems in the trade, the state bodies have labored for the benefit of the membership. As administrator of the Code under N.R.A. the national group, N.A.R.D., had unified the various interests among the states and in developing an effective code, had established the groundwork which aided the spread of Fair Trade.

A new technique was used to exert pressure influence in the drive among the states. It originated in California and was called the Captain Plan. Based upon the organization of thousands of militant retail druggists all over the country into small units, the plan made each unit the responsibility of a captain, with each captain reporting to the officers of the state association, and each association to the national body. Thus a word from the topcan send each druggist into simultaneous action with his associates. The strength of this plan was very great, as demonstrated by the notorious Pepsodent incident in California (1935) and by the drive for federal legislation in 1937.

In July 1935, the Pepsodent Co. notified California druggists it would no longer set retail prices under the

state law. The company was shipping direct from Chicago and was therefore involved in interstate commerce. The company doubted the legality of Fair Trade and expected to sufficiently increase volume by vigorous advertising to offset the increased cost of sales efforts and possible litigation costs. Both the Northern and the Southern California Retail Druggists Associations condemned the company and urged its members to discontinue the sale of the products of any and all companies which cancel Fair Trade contracts. The response through the Captain Plan was amazing. It was almost impossible to purchase Pepsodent products for some time and the company sales dropped to disastrous levels. Under such pressure the company capitulated and issued price fixing contracts for California. The Pepsodent Co. also sent a check of $25,000.00 to N.A.R.D., suggesting it be used to finance price fixing battles.(1)

Pressure tactics were utilized to further proposed federal legislation exempting fair trade contracts from interference under the anti-trust laws. This was the first use of the Captain Plan on a national scale. A congressional contact committee was named in each district in every state on the theory that in every subdivision there would be druggists who were personal or political friends of the Congressman or Senator. Direct appeals of this type would be more effective than letters and telegrams.

(1) Dakin, R.--"F.D.R.Opposed Federal Retail Price-Fixing Bill" PM New York Daily--January 16, 1941-p.9

The bill failed to pass in 1936, but the plan was reorganized on a smaller county-unit base in 1937. The Miller-Tydings amendment (passed by the Senate at the previous session) was reintroduced into the House and weekly pressure was applied. In the N.A.R.D. Journal of February 18, 1937, every member was urged to write to Senators and Congressmen each week until the legislation was passed. The move was successful and it was only the censure by President Roosevelt that delayed its passage. By a parliamentary subterfuge, the Miller-Tydings bill was approved on August 17, 1937 and new problems faced the national body.

In September 1937, at a Chicago meeting held for representatives of the state pharmaceutical councils, N.A.R.D. bid for supreme authority in the operation of the industry's price control machinery on a national basis. The state councils, however, had grown strong in administering Fair Trade within their jurisdiction and were unwilling to sacrifice the power, the prestige, and the expense accounts which they had developed. Some state bodies had experienced difficulty in lining up both the large and small members on a uniform level and they were opposed to centralizing authority in the national body, lest local gains be lost in attempting uniform national price terms. The meeting adopted a twelve point program with elastic provisions which permitted the national association to establish

a wide authority. The following major points were emphasized:

Retailers should refrain from coercive measures.

Retailers should not dictate or attempt to dictate resale prices.

The examination and approval of Fair Trade contracts should be handled by a national board acting in an advisory capacity with the various state committees. (The National group wanted to be arbiter as to form on all Fair Trade contracts. The State councils objected).

Appropriate Fair Trade literature should be developed by the national board.

Effort should be made to have the manufacturer issue the manufacturer-retailer form of contract rather than the wholesaler-retailer type of contract.

Action for violations should be prosecuted by the trade mark owner.

These salient features of the program indicated that the N.A.R.D. wished to be as powerful as the states would permit. But in the interval between the Chicago meeting and the St. Louis convention in early October, strong objections were raised by the Federal Trade Commission, the Department of Justice, Senator Tydings, and other critics who feared that horizontal prices would be dictated under such a plan. Some organization was needed to compel producers to come to terms in order to obtain satisfactory

prices and profits. The national association had hoped to accomplish this for the states but in the face of threatenedprosecution under the Sherman Act, the entire program was abandoned, some broad advisory resolutions were passed, and control for each state was remanded to the state councils. Coercion of manufacturers was repudiated and members were warned that to dictate resale prices, charge fees to manufacturers, and to control the distribution of contracts were illegal and dangerous to the Fair Trade movement.

In its advisory capacity, the N.A.R.D. has indicated an official policy to guide the individual member. As reported by Corwin Edwards, the executive secretary issued in part:

> "A number of the largest manufacturers have had the courage to bring out minimum prices which are eminently fair to the public and which at the same time provide you with a fair profit. I cannot recommend too much support and cooperation for these manufacturers. As to those who have not provided such a margin of profit, I say: Cooperate to the extent which is in line with good business in the management of your store----. We have counselled our members to give a free flow of merchandise to every Fair Trade manufacturer. Usually the druggist can find one of these (fine manufacturers operating under Fair Trade) to whom he can honestly and profitably afford his cooperation, directly in competition with the insincere manufacturer who is trying to thumb a free ride." (1)

The emphasis with which the retailer followed the associations policy of cooperating with manufacturers who utilize Fair Trade has been the subject of open criticism as opponents attack the boycott threats by which manufac-

(1) Edwards, Corwin--"An Appraisal of Fair Trade" before American Economic Association, Dec. 27, 1939

turers are compelled to issue resale price contracts. Producers have been coerced into falling into step by promises to place their products under the counter if contracts are not issued. The more items on Fair Trade, the larger theinsured profit for the dealer. All attempts to discuss the question publicly have been throttled and today the average citizen knows little about the question despite the fact he is the most vitally concerned - he bears the increase in cost. Members were advised in the N.A.R.D. Journal of June 16, 1938 as to procedure.

> " List Fair Trade items in your advertising but do not make any mention of Fair Trade - the way to handle Fair Trade is to keep hammering away with the fact you offer nationally advertised merchandise at the lowest price at which it can be sold, and couple that with a plug for your service, reliability, and other natural advantages which you, as an independent druggist, have over other competition."

In the American Druggist, June 1938, the secretary of the Northern California Retail Druggist Association makes the following suggestion:

> " We advise our members to avoid mentioning the word 'low' in telling their price competition story to customers. There is no point to inviting discussion of the Fair Trade Act.---We say to treat the present price conditions as a matter of fact---just as though they had always existed."

"The passage of resale price legislation has become a classic example of the use of misrepresentation by a

pressure group." (1) Legalized resale price legislation in the states was drafted and fostered by the lobbyists for the retail druggists who would benefit by the increased profit margin guaranteed by the producer. Although little support for the legislation was secured from other sources, the bill was presented as being supported by the entire retail trade in the state. PM quoted from reports of two state organizations as printed in the N.A.R.D. Fair Trade Manual to illustrate the sponsorship for this measure: (2)

Washington: "Special care was taken not to have the Act labelled as a druggists' measure. Other groups were notable for their absence, but profiting from experience, the main theme at the hearing was that Fair Trade would be beneficial to all retailers as well as to the public itself."

New York: "The Fair Trade Act of New York was sponsored by the New York Pharmaceutical Association alone.---The Act was presented as representing the views of a great body of retailers but the success of the movement was practically the single-handed job of the druggists of the state."

Roger Dakin listed some of the responses from the state pharmaceutical associations to the question: "On what basis did you select the members of the Legislature

(1) Edwards, Corwin---Memorandum for Assistant Attorney General re:Grounds for Repeal of the Miller-Tydings Amendment, February 10, 1941

(2) Dakin, Roger---- Druggists Admit Sponsoring Price Fixing Statute PM New York Daily - Jan. 13,1941p. 12

who introduced the measure?" as recorded in the section on "Fair Trade Experiences" in the N.A.R.D. Fair Trade Manual: (1)

New York: "The bill was introduced by selected influential members of each chamber--who had not been previously identified with purely pharmaceutical legislation. It was thought wise not to permit the bill to become earmarked as a piece of drug legislation."

Iowa: "The druggist membership of the Legislature in each house was called together and took full charge of the selection of men, thought best to introduce the measure."

The early bills were enacted with little public discussion, in line with the policy of the druggists to discourage debate. In the first thirty-two states in which the bill was passed, there were only two public hearings before passage. Legislators paid such little attention to the question --- some did not know for what they were voting --- that a serious stenographic error in the California law was incorporated verbatim into the law of ten states before the error was corrected.

California version: "That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not in turn, resell except at price stipulated by such vendor ---"

Corrected version: "The underscored phrase in delivery should be replaced by the phrase any dealer."

(1) Dakin, Roger--Druggists Admit Sponsoring Price Fixing Statute PM New York Daily - Jan.13, 1941 p. 12

The powerful influence of the N.A.R.D. was exerted in all the states in cooperation with the state councils. The body was recognized as the most formidable pressure group in existence but its tactics were sometimes not exemplary. In May 1938, the report of the grand jury at Waterbury, Conn. charged Mayor Hayes, Comptroller Leary and twenty-four others, with "conspiracy to defraud and cheat the city of large sums---". The grand jury accused the city comptroller in the indictment, of an extraordinary interest in the Fair Trade bill because of his private interests. The charges alleged that sums paid by the City of Waterbury to political leaders were designed by the Comptroller to influence their support in the passage of the bill. The activities of the paid political lobbyists were condemned, for as revealed by the investigation of the grand jury, they constituted "a real hindrance to the enactment of legislation designed for the general welfare of the state." The National Association of Retail Druggists was censured at the time for payments of approximately $13,000.00 to political lobbyists in order to further the bill.(1) Such revelations disturbed the independents at the time, lest the unfavorable publicity slow down the progress of Fair Trade.

Unsavory incidents as this were uncommon as Fair Trade spread among the states. The National Council works

(1) Business Week - May 28, 1938 "Fair Trade Lobby" p. 15

jointly with the states to maintain all the advantages that have been gained. Through its own publication, the N.A.R.D. Journal, which is issued twice monthly, the national association informs members of pertinent legal decisions and new legislation, advises the druggists what policy should be adopted on matters of mutual interest, and encourages the members to work for the benefit of the trade. The campaign for a united front under Fair Trade continues, as efforts are being made to secure the enactment of legislation in the jurisdictions outside the fold, namely, Texas, Missouri, Vermont, Delaware and the District of Columbia. The Journal of February 6, 1941 announces Fair Trade bills have been reintroduced in Texas and Missouri and urges readers to cooperate in all ways possible to facilitate passage. On December 5, 1940 the national organization contacted all state associations requesting that the current list of members comprising the Congressional Contact Committees be forwarded to national headquarters. Responses were quite prompt but the Journal of February 20, 1941 urged compliance by the trade members so that the coordination of the committee groups might be accomplished, thus making the contact committees available for any emergency threatening Fair Trade.

By 1941, attacks upon Fair Trade were becoming more deliberate and the National Association of Retail

Druggists, champion of the movement, was forced to become defender. The Anti-Trust Division of the Department of Justice has been opposed to the anti-trust tendencies of the resale price movement and in his recommendations to the Temporary National Economic Committee at the hearings on Monopoly Investigation, Thurman Arnold, Assistant Attorney General, urged outright repeal of the Miller-Tydings Amendment. The National Association promptly forwarded a strong protest with T.N.E.C. because of the unwarranted attacks. The protest consisted of an open letter to the committee members, accompanied by prepared statements and literature defending Fair Trade. The N.A.R.D. Journal reprinting in full the prepared statement submitted, suggests that members who are listed among the constituents of the T.N.E.C. committee members, should communicate with them asking that T.N.E.C. refrain from derogatory criticism of the Fair Trade laws "in the absence of adequate public hearings in which all pertinent facts could be adduced." (1) It is interesting to note the tenor of this complaint coming from N.A.R.D., particularly since this was the organization that steered the Fair Trade state laws through the legislatures with practically no public hearings at all. In addition, PM New York Daily, has launched a series of attacks at the movement in general,

(1) N.A.R.D. Journal---N.A.R.D. Sends Protest to T.N.E.C. February 6, 1941 p. 179

and in particular, at the Feld-Crawford Law of New York. Similar critical articles have appeared more frequently. The staff of the N.A.R.D. Journal has been active in meeting these challenges leveled at Fair Trade. As recorded in the Journal, the members are advised that by contacting the local legislator on Fair Trade and wiring to Washington to oppose the repeal of the Miller-Tydings Amendment, the members will "serve yourself, your neighbors, and your country." (1) However, in a message from J.Dargavel, Executive Secretary, in the same issue of the Journal, he chides the druggists for indifference and recalls former conditions:

> "A lot of lazy-minded druggists have been inclined to forget all too thoroughly how business was done in 1934 and 1935. They have forgotten what it meant to have nearly every customer coming into the store remarking, 'that they could buy it down the street for less'. They have forgotten that traffic was going by their doors, instead of through them. They have forgotten that almost all of the sales of many popular items were made by the chains and the pineys. --- If druggists do not want to experience a wide orgy of price cutting, it will be to their advantage to get busy and protect the gains that have been made---."(2)

This official statement emphasizes that the druggist has benefited materially from Fair Trade. In the crusade for its complete enforcement, N.A.R.D. moves not

(1) N.A.R.D. Journal---N.A.R.D. Sends Protest to T.N.E.C. February 6, 1941 p. 199

(2) N.A.R.D. Journal---"Do You Prefer Fair Trade or Chaos"p. 165

only with a philanthropic motive for the people whose health the druggist serves, but also with a material motive for its far-flung membership.

IV The Miller-Tydings Amendment to the Sherman Anti-Trust Act

When the several states had enacted Fair Trade Acts, the retail druggists discovered many of the manufacturers were reluctant to issue resale price contracts because, it was explained, the shipments were involved in inter-state commerce. This evasion to avoid establishing minimum resale prices was well founded in some instances, but numerous producers used the excuse as a subterfuge to avoid the Fair Trade restrictions. From the beginning, several manufacturers had been the "rich uncle" by advancing costs of the court tests of the state laws, expediting passage of the fair trade legislation, and by distributing propaganda for resale price maintenance. The rewards for these manufacturers had been large dividends from sales in retail outlets where the dealers featured the products of cooperating producers. For example, in Ohio the retailers sponsored a "Dr. West's Week"and in New York the State Pharmaceutical Association issued a list of manufacturers entitled to free window display space. As the power of the independent druggist increased with the spread of Fair Trade more manufacturers became willing to issue contracts. With increased numbers of producers signing to acquire the benefits from Fair Trade the big initial dividends were being spread around among more participants.

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A large number of manufacturers stayed outside the fold, despite the pressure from the druggists to influence them to the contrary. For proper operation under the state laws, a manufacturer should have been domiciled in the separate states. This required an expensive and complicated administrative control and exposed him to countless state taxes. There were few companies with sufficient financial strength and strong organization to attempt such a program. The smaller producers feared the federal law in shipping from one state into another under resale price contract, for the Dr. Miles decision of 1911 was still the established legal precedent in the Federal Law. Under that decree, free competitive prices were essential with no resale price agreements permissible. An alternative procedure existed by instructing the wholesalers to include the producer's merchandise at a specified price in the "omnibus" contracts issued by the wholesaler. With this type of agreement, the manufacturers were not responsible for the enforcement of the established price. The druggists therefore did not favor such an arrangement for there was no provision for policing or method of enforcing the Fair Trade application.

The manufacturers were fearful of possible complications under Fair Trade. A uniform mark-up on a product for the country as a whole was not feasible because

of varied shipping and handling costs, variances in purchasing power in different sections, and different competitive conditions. At the same time, it was anticipated that sectional variations in markups would cause grief, for borderline dealers would complain of discrimination. Fair Trade was initiated as a permissive measure for each producer and at first the relationship between manufacturer and dealer was cooperative. As the movement advanced, with the retail druggists seeking to secure all possible benefits from effective application, the earlier requests for cooperation changed to demands for contracts under the law, accopmanied by "instructions to manufacturers" on contracts, margins and control methods. In other words, the retail druggist was starting to call the tunes while the manufacturers danced.

It had been apparent to the advocates of Fair Trade that federal legislation was essential for the effective control desired. By submitting contracts only in the state where company headquarters were located and by refusing to sign up the dealers in other states because such action was considered subject to the anti-trust laws, the manufacturers had slowed down the progress of Fair Trade. The National Association of Retail Druggists utilized the Captain Plan in order to influence the legislators at Washington for a law that would exempt from anti-trust implica-

tions those contracts offered for minimum resale prices on goods shipped in inter-state commerce between states with a Fair Trade law.

The retail druggists organized the drive for federal legislation during 1935 and submitted their bill in 1936. This bill called the Miller-Tydings Bill failed of enactment although it did pass the Senate. At the next session, when it was re-introduced into the House, the Captain Plan showered the legislators each week with letters and telegrams. The House Judiciary Committee approved the measure and passage appeared to be certain. At that point, the President indicated his disapproval in a letter to Congressional leaders:

> "The present hazard of undue advances in prices, with a resultant rise in the cost of living, makes it most untimely to legalize any competitive or marketing practice calculated to facilitate increases in the cost of numerous and importantarticles which American householders, and consumers generally buy." He continued by quoting the opinion of the Federal Trade Commission as submitted to the Chief Executive: 'There is great probability that manufacturers and dealers may abuse the power to arbitrarily fix prices, resulting in a bitter resentment on the part of the consuming public, especially in this period of rising prices.' The President concluded: "Since we seem to be in a period of rising prices, this bill should not, in my judgment, receive the consideration of Congress until the whole matter can be more fully explored."(1)

As the session of Congress was drawing to a close, it did not seem probable that the members would

(1) Dakin, R.--"FDR Opposed Federal Retail Price-Fixing Bill" PM New York Daily---January 16, 1941-p.9

vote against the recommendation of the President. The bill seemed destined for the next session. Senator Tydings, however, conceived the idea of adding the bill as a rider to the District of Columbia Appropriation Bill, a measure that had to go through before adjournment. The trick of Senator Tydings was successful, for the appropriation bill was passed with the Miller-Tydings Amendment to Sherman Act tacked on. The President could not veto the Miller-Tydings amendment without killing the entire appropriation bill. As Congress had adjourned and the district needed the money, the President signed the bill, but only after denouncing the Fair Trade advocates for subterfuge.

The methods by which the Miller-Tydings Bill was pushed through Congress have been the cause of sharp debate. It is maintained by the Anti-Trust Division of the Department of Justice that the lobbying campaign of the Fair Trade sponsors was based on misrepresentation. In urging the Sherman Act amendment upon Congress, the argument was advanced that Congress was merely acquiescing that Federal control of interstate commerce should not stand in the way if the various states desired to legalize resale price maintenance. The legislation was not supposed to involve the acceptance of resale price maintenance as a Federal principle. The state laws were explained as

merely grants authorizing the manufacturers and the retailer to agree upon the resale price for branded merchandise. It was not realized by many members of Congress that the state laws provided that if a manufacturer and a retailer sign a resale price contract, all retailers who are notified of the contract must observe the minimum selling price. Thus the competitors of a retailer are bound against their will without a public hearing and with no appeal. (The state of Wisconsin is an exception to this rule.)

Whenever criticism is leveled at the Miller-Tydings Amendment, one of the first points of attack is that such a far-reaching measure was enacted as a rider to an essential appropriation bill. This fact has been emphasized before the TNEC in its study of Monopoly for Congress. One such statement from Monograph No. 16 is as follows: "This proviso easing the way for a manufacturer who would price-fix a trade-marked good can hardly be referred to as a deliberate act of legislation since it was sneaked through as a rider to an appropriation bill."(1) The N.A.R.D. Journal dated February 6, 1941 publishes a general announcement, "Statement of The National Association of Retail Druggists on the Fair Trade Laws." The quotation above from Monograph No. 16 is assailed for "language intemperate in the extreme" and as a whole "not in accord-

(1) Hamilton, W. - (Yale Law School) and Till, Irene (Analyst of TNEC)--Monograph No.16, "Anti-Trust in Action"p.11

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ance with the facts". The Statement narrates the legislative steps followed in advancing the Miller-Tydings Bill and claims it was stopped by a "one man filibuster" by Senator King of Utah. "As a last resort and after exhausting all other means to secure consideration by the Senate, Senator Tydings attacked the bill as a rider to a piece of District of Columbia legislation. This action was approved by the Senate---and was signed by the President." The N.A.R.D. Statement does not indicate that the Miller-Tydings Bill had to go through as a "rider" because Congress had refused to consider it as a separate measure due to the President's opposition to the principle. No reference is made in the statement to the opposition by the President, the Secretary of the Treasury (alcoholic industry supervision), the Federal Trade Commission, and the Attorney-General's office.

The passage of an amendment to the anti-trust law had been expected, for one of the strongest lobbies was determined to put it through in order that the Fair Trade laws would be fully operative. Formerly, any conspiracy to fix resale prices in commerce had been considered a violation of the Sherman Act, but the Miller-Tydings amendment provided exemptions for a limited group of resale price contracts and agreements. A resale price contract requires the following conditions in order to come within the exemption:

1. It must cover only commodities which are identified by trade mark, brand, or name of producer or distributor.
2. It must cover only commodities which are in free and open competition with commodities of the same general class produced by others.
3. It must be lawful as applied to intrastate transactions in the jurisdiction in which resale is to be made.
4. It must include no unreasonable restraints other than the prescription of minimum resale prices.
5. It must be entered into by parties who are not in competition with each other.

Agreements between competitors involving resale price arrangements are still unlawful under the Sherman Act, as amended by the Miller-Tydings amendment. Any such agreement made between competing manufacturers or between competing distributors, participating either at the same level or at a different stage of manufacture or distribution, is considered a violation of the Sherman Act. This type of price arrangement is termed "horizontal" agreement, whereas the "vertical" agreement only is permitted under the amended act. In addition, there is no provision granted by the Miller-Tydings amendment which permits organized effort to force any concern to issue or accept

resale price contracts.

The enactment of the Miller-Tydings Amendment to the Sherman Act forced American industry to pause and get its bearing. "With one squiggle of his pen, Franklin D. Roosevelt changed the whole theory and the probable future practice of American industry." (1) Before Fair Trade, American business operated, as required by law, so that prices reflected competitive conditions free from artificial controls. With the amending of the Sherman Act, Congress legalized the establishment of machinery for a national system of price-fixing, enabling the flow of minimum price contracts between the states in accordance with the provisions of the respective Fair Trade laws. A New York manufacturer was permitted to set a minimum price for his goods in California, either on his own initiative or at the request of West Coast dealers.

It was expected at the time that whether or not a manufacturer set minimum prices on his goods would not be a matter of his own volition, but would be determined by conditions in the trade. In the first place, without the practice of vicious price-cutting and "loss leader" selling there would be little need for resale price contracts. Small dealers had been organizing into voluntary chains, permitting them to operate on a comparable basis

(1) Business Week - August 28, 1937--- Resale Price-Fixing under the Fair Trade Laws-p.37

with the corporate chains. At that time the super-market was a new institution, but as its economical operation encouraged its expansion, the benefits from the voluntary chain to the independent were offset. He was just as anxious as formerly for price protection. Secondly, if the products of a manufacturer were not subject to switching, the dealers would not request the issuance of contracts. Still a more important factor in determining how completely the law would operate, was the strength and effectiveness of dealer association. In New York and California, for example,there were well organized trade associations that exerted strong control over the membership. It was anticipated, and correctly so, that members would be advised what contracts to sign, which ones to reject, and the brands of merchandise to push. Some of the manufacturers of national brands also expected that issuance of resale price contracts would be influenced by geographical location. By satisfying dealers in the big-city districts where price-cutting was extreme, the producer would be able to issue contracts for a limited number of states and thus have satisfied his most important customers. He would therefore have avoided the problems arising from national operation by issuing contracts for the states of New York, New Jersey, Pennsylvania, Massachusetts, Illinois, Michigan, Ohio and California. The retail druggists did not permit this plan

to work out, insisting on national set-up for prices wherever permitted by the law of the state.

It was readily discernible that the state Fair Trade laws supported by the Miller-Tydings enabling act would operate counter to the spirit by which American business had developed. Analysis of Fair Trade operation in the states up to that time indicated that the effect had been to raise prices due to larger profit margins for retailers who backed demands by threat of boycott. The industry of this country had expanded in growth through the development of mass production and mass selling. Brand and product identity had been the requisite for mass selling, made possible by means of advertising, through which agency manufacturers had invested millions of dollars in brand and trademark identification. During the depression years of the past decade, the mass production industries were the companies with the resources in reserve to carry on and maintain payrolls. Under the state and federal resale price-maintenance laws these companies will have to yield to pressure for higher prices, jeopardizing the results of efficient advertising. These companies will be subjected to competition from unbranded and private brand merchandise selling at lower prices. The American consumer has developed confidence in advertised goods, but what will the reaction be as these prices are pegged at a higher price level?

It may be that the public will conclude that advertised, trademarked products are arbitrarily priced at an unreasonable price level. Should this be true, the public will direct its buying consistently into the channels for unadvertised, private-brand merchandise. Time will provide the solution.

Effects of Fair Trade Legislation

The Miller-Tydings Amendment furnished an incentive to the enthusiasts of Fair Trade to push the measure among the states. It was not long before the remainder capitulated so that contracts for resale prices can now be issued to dealers in forty-four states. Attention has been directed to the fact that the most successful application of price contracts has been in the drug and toilet articles. An extremely effective trade organization has backed the dealers so that manufacturers have been "requested" to issue contracts as protection for the independents. When N.A.R.D. was campaigning for Federal legislation to remove the anti-trust threat to minimum price contracts between the states, the druggists realized the manufacturers were not as enthusiastic as formerly. Without Federal legislation, producers were orally giving support to Fair Trade, but actually were refusing to issue contracts, using the excuse of possible violation of anti-trust restrictions. Many producers were found to have been rendering "lip service" to the retailers in the fight for Fair Trade. The druggists, through the powerful National association, had been using the power of suggestion to bring these producers back in line. It was at this point that the manufacturer wondered how much control he was really going to have over the retail price of his

own products. The minimum price had to meet the approval of the druggists and the association naturally set the price to furnish a profit to the least efficient outlet. This type of system removed the competitive urge for economical distribution. By insisting upon higher retail prices under minimum contracts to cover operations cost the retail druggists affected the level of prices. The direct result has been an increase in the price for trademarked goods in centers of mass distribution, while in the suburban districts there may be slight decreases in price as the independents, with less competition, had preserved a higher price level. The interference of the retailer in the established price had resulted in the convergence of prices of competitive products. A dealer would not set a minimum price on his product unless he was certain that competitors would not establish their minimum prices at a lower level than his. In order to meet the challenge of higher prices, there was an increase in the granting of indirect concessions, such as larger size packages, premiums and 1¢ combination sales. The real threat from increase in prices came from private brand merchandise. Some trade associations introduced new private brands to be distributed through member stores. The danger from price-cutting is not so great to the manufacturer as the threat from this private brand merchandise which sells

substantially lower than standard items.

It has been maintained that if consumers object to the higher prices of national brands, they can turn to lower priced unknown brands. But the consumer is a suspicious character at times, and particularly in drug articles about which he knows little. He will be reluctant to turn from a national brand to an obscure private article unknown to him. In other trades the housewife can be persuaded to try a new package, but not in the drug and sundry line.

Therefore whenever higher prices are realized, it means that the consumer is paying more to the druggists. The Druggists Research Bureau published during 1940, a survey made in its member outlets called "Fair Trade and the Retail Drug Store." Considerable emphasis was given to the reduction in price on drug store items sold through independent drug stores. This condition existed in suburban localities where prices had always been higher than in the competitive mass distribution centers. This same survey reveals that chain drug stores have increased their gross revenue on fifty fast moving items by 4.9 per cent since Fair Trade.(1) Inasmuch as price increases have prevailed in heavy population centers and metropolitan districts, there are more consumers paying increased prices

(1) H.W. Adkins--"A Plan of Approach to Building Wholesaler Goodwill"--National Wholesale Drug Association 1940 Year Book--p.75

than there are consumers who are realizing a saving. The F.T.C. is currently conducting a survey of Fair Trade and the difficulty of determining what was price before Fair Trade was enacted under highly competitive conditions has caused the survey to conduct its investigation as a comparison between items on Fair Trade and similar items as found in private brands. The report is expected to reaffirm the traditional opposition of the Commission to any kind of price restriction and to contract prices.

Despite the success of Fair Trade in the retail drug field, its operation in other phases of business has not been satisfactory. This has not been the result of consumer opposition, for that has not yet crystallized against Fair Trade. It is due, rather, to the lack of co-operation between associated members of the various trade associations and the reluctance of manufacturers to accept the principle of Fair Trade.

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The Feld-Crawford Act of New York and the Opposition of Macy and the Liquor Trade

The New York Fair Trade law, named the Feld-Crawford Act, became effective May 17, 1935. Embracing the largest retail market in the United States, this state was singled out for enrollment early in the campaign for Fair Trade. The California statute was the model for this measure, even to the inclusion of the stenographic error "in delivery" for "any dealer" (corrected in the New York statute on February 10, 1938.) To aid passage of the bill, the National Association of Retail Druggists and the New York State Pharmaceutical Association enlisted the aid of small retailers, wholesalers, and distributors and secured support from the manufacturers favorable to resale price control. Chief opponents were the large department stores and cut-price stores like Macy's---the consumer could not be stirred into action.

In analyzing the background of the Feld-Crawford Act, Roger Dakin in PM asserted that the retail druggists fostered public indifference to the measure.(1) The manner in which views of opponents to the bill were treated--or omitted--created impressions favorable to the druggists' campaign to control public opinion. Newspapers used the term "Fair Trade" freely in the headlines and helped give the laws a favorable atmosphere.

(1) Dakin, R.--"Druggists Obscured Fair Trade Issue to Public"-PM New York Daily--January 17, 1941-p.12

Publicity could not be avoided in the cities, but in deference to the small retailers, the story was usually reported on the back pages. There was no attempt to evaluate this controversy from the viewpoint of the consumer. Stores like Macy's tried to stimulate consumer interest by full page advertisements with little result-public may have felt Macy was opposed for its own benefit. The issue was generally fogged in the newspaper and opinion was treated in this light: Are you in favor of Fair Trade or are you for stores like Macy's that are trying to kill Fair Trade? The success of Fair Trade can be attributed in part to the ability of the sponsors to limit debate on its merits to trade association publications.

The bookpublishers quickly placed their editions on Fair Trade, at the request of many independents seeking relief from price-cutting by department stores. The contracts stipulated no new titles should be sold at less than list for one year after publication. R.H.Macy and Co., with the biggest and best book department in the world, immediately attacked the publishers, issuing a pamphlet, "The Author's Wallet", designed to show that all previous attempts to stabilize prices of books, notably in England, had resulted in sharp reduction of sales. Macy won the first round in the courts against Doubleday, Doran and Co., before the New York Court of Appeals (January, 1936)

on the grounds that the "non-signer" clause violated the due process and equal protection clauses of the Constitution. But in December, 1936, the second round went to the publishers, for the United States Supreme Court decided that the Fair Trade laws did not abridge constitutional guarantees. (Old Dearborn Distributing Co. v. Seagram Distillers Corporation 299 U.S. 183). Subsequently the New York Court of Appeals reversed its ruling to coincide with the Supreme Court decision so that the law of the state conformed with Federal interpretaion.

Macy had thus lost the most important legal round, but nevertheless continued to be the most active opponent to Fair Trade. Continuing to fight the publishers, Macy formed the Red Star Book Club to take advantage of the clause in the publishers' contracts exempting book clubs from price regulation. This exemption had intended to apply only to established book clubs such as The Book of the Month Club and the Literary Guild of America. Members of Macy's Book Club were offered a 25% dividend certificate to be applied in the purchase of new books--members were required to buy annually four books, price fixed at the full list price. Other department stores followed suit and the dividend was raised to 30%. Fair Trade was being successfully circumvented.

The book publishers were confused by this situation and some wished to discard Fair Trade. After a conference two courses of action were taken. The book club exemptions were eliminated and titles selected by the old-line book clubs were not price-fixed (this provided a loss leader to the dismay of the independents). The alternate method was to issue individual contracts drafted to apply to the regular edition but not the volume distributed by the book clubs.

Macy's book club continued to operate. The publishers filed joint action against Macy charging deliberate violation of the Feld-Crawford Act. In counter-suit Macy charged the publishers with combination and conspiracy in restraint of trade(Sherman Anti-Trust Act) and with unfair price discrimination favoring the old-line book clubs (Robinson-Patman amendment to Clayton Act.) The charge of combination in restraint of trade rested upon allegations that publishers' contracts were virtually identical in phrasing (characteristic of fair trade contracts in any industry) that they uniformly set the full list price as the legal minimum for one year, that they provided common exemption to the old-line book clubs. Macy contended that the publishers were not entitled to relief because they threaten destruction of Macy's goodwill developed through its book-selling operations. Macy also contended each publisher

enjoyed a monopoly in the book he publishes, that the publisher can and does restrain reproduction of his books and that as a consequence, books are not goods "in fair and open competition" as required by the Fair Trade law.

Macy in the meantime continues to operate its book club with 64,000 members.

With other products Macy is equally vigorous in attacking Fair Trade. It utilized full page ads in newspapers, listing approximately 100 of its 500 private brands, drug and toilet preparations against nationally advertised counterparts. It named names and prices, showing consumers how to save 6% to 78%. "Save with Safety" was the theme.

On price-fixed merchandise Macy has been forced to respect the minimum prices established by the manufacturer. A small label is attached to articles sold under Fair Trade minimum price. The label reads: "Price-fixed by the manufacturer or wholesaler under the Feld-Crawford New York Law." In its large New York City department store Macy conducted comprehensive surveys of the effects of the Fair Trade law upon retail prices. The results support the contention that in competitive retail areas and the mass centers of distribution, prices have been raised substantially.

Type of Commodity	Macy 1937 Survey(1)		Macy 1940 Survey(2
	Number of Brands	Price Increases%	Price Increase% 4700 Items Analyzed
Cosmetics	1124	8.6	8.5
Drugs	560	15.7	16.0
Liquor	168	12.4	11.8
Books	709	17.4	17.6
Miscellaneous	241	20.4	15.8

The persistency with which Macy has attacked Fair Trade laws and the success enjoyed by the company has had wide influence. As a result of the wide publicity of price comparisons, "Macy's Own" private brand merchandise has shown a sensational increase in volume. The company has been successful in circumventing Fair Trade on important lines of merchandise. Macy has actually demonstrated the futility of legislating price regulation and the company's emphasis on its private brand merchandise checked plans in the grocery field for embarking on Fair Trade.

Macy put extra power into its fight against price fixing by stepping into the wholesale drug field. Establishing a separate division in 1937, Supremacy Products Inc., its non-price-fixed private brand drugs and cosmetics were made available to other stores. Moving carefully, Macy first put its wholesale line into a few department stores. However, during 1940, Supremacy Products began

(1) Walker, Q.F.--Monopolistic Aspects of the Fair Trade Laws (R.H.Macy and Co. New York, 1938) p.17

(2) Walker, Q.F.--The Consumer and the "Fair Trade Laws (R.H.Macy and Co. New York 1940) p.26

showing up in the new drug sections of super markets, and by December had 80 such outlets.(1) Retail druggists were dismayed, for if Macy succeeds in establishing a volume basis for its wholesale line through the supermarket where the volume is large, then the corner druggist stands to lose much of his regular business. In the new outlets Macy products outsold the nationally advertised brands, the performance being similar to earlier results in the main New York store. Since early in 1941, Macy has also been supplying a few retail druggists in the heart of the New York area. Although officials insist the company is only experimenting, it is expected that a distribution policy will be announced shortly. In the meantime, the druggists are apprehensive over the prospects of national distribution of Macy products and its adverse effect on the Fair Trade program.

The control of liquor prices under the Feld-Crawford Act has never been very successful. Whenever the sales volume slows down, a slam-bang price war will flare up for a short time. There have been several situations, however in which the liquor dealers appeared in an unfavorable light.

The purpose of price maintenance has been the protection of the manufacturer from price-cutting, so states the law and the Supreme Court. Schenley Products

(1) Business Week--December 7, 1940- "Drugs in Supers" -p.35

discovered otherwise in August, 1938, when the company cancelled its existing contracts and announced new contracts with lower margins, effective September 2nd, on its three leading brands. The margin for liquor had been 40%, a lucrative profit for the retailer. While a merry whirl of price-cutting up to 35% occurred, the independents clamored for reconsideration. Across the entire country, the new Schenley policy was attacked by wholesalers and retailers.

For three weeks Schenley was buffeted from all sides. Then at a meeting with the New York Joint Liquor Conference it was announced that all differences were eliminated. The Conference included wholesalers, package stores, bars, and grills and had the support of the liquor salesmen's unions. Its purpose had been to police retailers under the Feld-Crawford Act, but it actually wanted to dominate the terms of sales agreements between distillers on one side, and the wholesalers and retailers on the other. (1) The new contracts were issued with little change, a victory for organized retailers in their battle for control of Fair Trade policies. The other distillers had been planning to free their prices and build volume if Schenley had been successful.

Periodic price wars continued in the New York market at regular intervals, despite the fact that

(1) Business Week---August 13, 1938-"Unfixing Prices"- p.16

the dealers were second to the druggists in demanding price maintenance. The next prolonged price war over fundamentals started in the late summer of 1940 and was still going on in February, 1941. The legal set-up had been clarified by a consent-injunction issued againstMacy, the result of a suit by Schenley. Macy was forbidden to cut prices below the Fair Trade minimum, but a clause was included freeing Macy from the restriction if Schenley failed to compel other dealers to observe the minimum. The legal presumption was that the distillers were responsible for enforcement of Fair Trade contracts and that retailers were free to cut prices in the absence of effective action by the distillers.

The break in prices started in August. Sales were slow, the result of a $4.00 defense tax per gallon effective from July 1st. In utter confusion prices were down 33 to 45%. Retailers threatened to sue distillers. The Metropolitan Package Store Association, unable to sue every dealer, withdrew suits and implied the situation was up to the distillers. The Association had recently introduced its own private brand, Winchester, to allow retailers a greater mark-up than received from National brands.

The retailers blamed the distillers for countenancing the war as retaliation for the introduction of the private Winchester brand. Distillers were giving such

generous discounts that dealers could not resist passing on the reduction. The distillers argued that the 40% mark-up was excessive and maintained only by the retail dealer pressure. The Fair Trade enforcement was collapsing because retailers were pushing low priced private brands with high markups. The distillers had agreed to the 40% margin provided that dealers pushed national brands, but they were not keeping the bargain.

The prices kept falling without restriction, as small dealers cut the large outlets, and vice versa. Distillers offered extreme discounts on 100 case lots, in an effort to have control of the market after the price war ended. This action aggravated the situation as the dealers passed along the savings. Each distiller was afraid to go back to the Feld-Crawford minimum prices as a first move, in fear that competitors might not follow his example. Retail associations were remaining quiescent for the Federal Trade Commission had been investigating the collusion of retailers in exerting pressure on distillers. The situation remains a stalemate.

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Representative Prices During the Price War (1)

	Schenley's Red Label Quart	Seagram's Calvert Special Quart
June price	$2.87	$2.87
August 10	2.03	2.09
" 14	1.92	1.99
" 27	1.79	1.99
" 31	1.79	1.87
September 6	1.79	1.83
" 16	1.59	1.78
" 20	1.59	1.59
" 27	1.59	1.54
" 30	1.54	1.50
October 1	1.49	1.50
" 2	1.49	1.49

Prices since then have varied between $1.49 and $1.56. Prices from Corbyon's Liquor Store, 17 Park Place, N.Y.

A thorough investigation into the effect of the Feld-Crawford Act upon the consumer was initiated by PM New York Daily in January 1941. In the January 6th issue the paper attacked the bill in an editorial indicating the paper's opinion. "The millions of dollars added profit that the law has given to retailers comes from the pocketbooks of New York consumers, and we have failed to be convinced that the consumer has gotten value in return."

A direct result of the Feld-Crawford Act was the rapid growth of the "discount houses" where any standard trademarked product could be purchased at reductions ranging from 10 to 50% under retail. These outlets were either offices with hundreds of trade catalogues from which the

(1) Dakin, R.---Liquor Prices were Fixed so High, the Fall Was a Crash--(PM New York Daily-February 3, 1941)P.18

article was selected or large showrooms on upper floors, catering to the employees of certain corporations. These places enjoyed a tremendous volume after 1935 because they offered consumers bargains prevented by the Feld-Crawford Act. The "discount" practice developed in other cities as a result of Fair Trade. In Boston, for example, many of the electrical appliance outlets are very liberal in the assignment of discount privileges. At these shops it is possible to purchase varied merchandise, including the following trademarked articles at discount despite the manufacturer's Fair Trade stipulation: Toastmaster, Sunbeam mixer and iron, Schick shaver, Remington shaver, Hamilton watches and Waltham watches. Despite complaints from the larger retail outlets and organized retail associations, the manufacturers have overlooked the practice, undoubtedly afraid that competitive products would be substituted if the dealer were censured by the manufacturer. Legitimate retail firms hesitate to institute legal action because of the resultant adverse publicity--big dealer bullying the little man. Meanwhile, the larger stores advertise and the discount houses reap much of the business, the only qualification being a "proper introduction" at the discount house. (Union Electrical Supply Co., Kaufman Electrical Co., Sager Electrical Co., etc.) Discount firms like C.C. Peters and Merchandise Sales, Inc. are able to operate as such by securing

merchandise through small suburban dealers with whom they maintain a working agreement on split commissions. With the rapidly increased demand for consumer goods, it is expected that manufacturers will recognize the just complaints under the law by refusing to fill the orders of the discount houses in favor of the stores which operate according to the Fair Trade regulations.

In determining what has happened to New Yorkers under Fair Trade, a comparison was made between the prices in Vermont, where there is no Fair Trade law, and the minimum retail price in New York. Fast moving, trademarked articles are compared with the Vermont prices from Frank's Economy Store in Burlington.(1)

Commodities	Retail List Price	New York Fixed Minimum	Lowest Vermont Price	New York Consumers Lose
Bayer Aspirin 100's	.75	.59	.36	.23
Bromo-Seltzer	.30	.25	.15	.10
Fitch's Shampoo	.75	.49	.29	.20
GilletteBlade 5's	.25	.25	.14	.11
Lysol	.25	.23	.13	.10
Dr. West Tooth Brush	.50	.47	.20	.27
50 Commodities (Arithmetical Average)	.457	.381	.254	.127

(1) Dakin, R.--"Feld-Crawford Act Does This"--PM (New York Daily, January 6, 1941) P.10

The conclusion is readily determined that the law was costing consumers in New York City a lot of money, but that the increased cost was not borne equally by consumers. "Most of the cost is being paid by the poor, the moderately well-off, and the thrifty consumer.(1)" Prices had been increased most drastically in chain stores serving the ordinary people.

Prices in Five Chain Drug Stores--New York City(2)
Lowest and Highest Price

	Before Feld-Crawford	After Feld-Crawford
Squibb's Dental Cream	.23-.26	.33
Gillette Blade 10's	.31-.34	.47
Mistol	.34-.39	.49
Vitalis (medium)	.57-.63	.79

The result of the N.A.R.D. Survey "Fair Trade and the Retail Drug Store" also supports the contention of Roger Dakin, (3) that stores where the average consumer trades were forced to raise prices. In New York state, the chain store average price of 50 fast moving items increased 5½ cents after Fair Trade but the average state price on the same articles for chain and independent stores combined increased 1.8 cents. The 5½ cent increase is the significant figure because it strikes the consumer of limited means.

The Act caused little price change in stores that had always maintained high prices, but it does deprive

(1) Dakin, R.--"The Consumer Loses under Fair Trade" (PM New York Daily--January 7, 1941) p.11

(2) Ibid--p.11
(3) Ibid--p.11

the needy and thrifty consumer of the chance to economize by purchasing where prices are lowest. Vermont retailers can advertise "Buy such and such nationally known trade-marked products at our store; our prices are lower." New Yorkers do not advertise in that manner for there is no point. All sell at one price, for a store with limited service can not offer his stock at less than the stipulated minimum.

In the New York market, experience had been varied under the Feld-Crawford Fair Trade Act. Drug and sundry toilet articles had been successfully established on minimum price levels and the dealers had cooperated with the state association in observance of resale contracts. The individual retailer was operating at a profit while the drug chains were reflecting an increase in earnings. Variety chains were introducing departments for packaged drugs. In the publicized book and liquor fields, Fair Trade standards had not been realized. The difficulties of enforcement and administration had bolstered the reluctance of other lines from issuing minimum contracts, diverting some of the efforts into the Unfair Practice laws forbidding below cost selling. The consumer is paying the cost and the retailer receives a sure profit. Should the consumer, under Fair Trade, be expected to continue increasing the retailer's profit in

return for stabilized prices, or should unrestrained competition prevail, as in the liquor industry, with the consumer seeking the "best Buy" offered?

[illegible]

PART III

THE UNFAIR PRACTICES ACT

The State Unfair Practices Acts

Resale price maintenance, effective by application of the state Fair Trade Acts, represents one type of loss-leader control and provides a check on price-cutting. A more flexible type is the loss-limitation legislation enacted by the states as the Unfair Practices Acts. This type of law differs from the resale price control legislation in which the minimum price is established by the manufacturer, in that the price level is related to the cost of the merchandise to the dealer. Under loss-limitation provisions the minimum price is (a) the actual invoice or replacement cost of merchandise to the dealer, or (b) such cost plus a fixed minimum markup percent, or (c) such cost plus operating expenses--dependent upon the particular law of the state. This type of legislation has been sponsored as a supplement to the Fair Trade laws, as it can apply to merchandise on which minimum prices are difficult to enforce under resale price maintenance. Furthermore, this type of price control is not dependent upon the initiative of the manufacturer, but is applicable to all commodities. Among the more active proponents of loss-limitation measures, are to be found the tobacco and the food and grocery trade--the former because the consumer buying habits are well established and producers would not consider minimum prices--the latter because with so many producers in the food trades

there was small possibility of uniform cooperation for resale price maintenance.

The loss-limitation laws are the direct result of NRA as administered by the Retail Food and Grocery Code. The Code prohibited sales below invoice or replacement cost, whichever was lower, plus a minimum markup of 6% to cover the direct labor cost of distribution.(1)

The grocer and food manufacturers had originally supported the Robinson-Patman Bill from behind the scenes in an effort to escape from the demands for price concessions. They had expected that prevention of large discriminatory discounts would make it impossible for big distributors to sell at substantially lower prices than the average. This supposition was not correct, for economies in distribution and the super-market permitted lower prices. Under Fair Trade they expected difficulties over minimum prices and disliked the possibility of higher prices on their national branded goods. Food manufacturers are ever anticipatory lest any opportunity be given to big distributors to step in and take over a market with lower priced private brands. The independent retailer was demanding relief from loss-leaders. The solution seemed to rest in the Unfair Practice Laws. The producers favored this solution to the problem and the independents approved, for the loss-leader would be doomed.

(1) Zorn, B. and Feldman, G.--Business Under the New Price Laws (Prentice-Hall, Inc. New York 1937) p.318

[illegible]

In the summer of 1938, President Lewis Cole of the National Association of Food Chains endorsed that form of legislation prohibiting selling at less than 6% of cost, expressing concern over price-cutting and the absence of satisfactory margins. "Our association has approved the Unfair Sales Act.---We regret that the food trade appears unable to achieve the constructive objects of such legislation without resorting to government aid."(1) The manufacturers of foods were hopeful that retailers in the grocery field would rally behind the laws prohibiting below cost selling and avert the need for extensive price control systems as required under Fair Trade.

The State of California was the leader in legislation for the Unfair Practices Acts as it was the leader for Fair Trade. The California druggists supplemented theFair Trade law with an unfair practice act in 1935 which forbid sales below cost. The law defined "cost" as replacement or inventory value plus all the expense of doing business, including such items as salaries (Proprietor included) rent, depreciation, delivery, credit losses, taxes, insurance and advertising. The bill was supported by the Associated Grocery Manufacturers of America. This type of law was overshadowed by the publicity given to the Robinson-Patman Act and the Fair Trade laws. By the end of 1937, there

(1) Business Week--July 2, 1938--p.18-"Chains Ask Price Law"

were 17 similar state laws, by the end of 1939 there had been 27 similar state laws with three declared unconstitutional by state courts of Nebraska, New Jersey, and Pennsylvania. Currently there are twenty states operating with Unfair Practice Acts.

The California statute of 1935 was amended in 1937 to strengthen original provisions. It served as a model for most of the other states. New provisions defined "loss-leader" as "any article or product sold at less than cost to induce purchase of other merchandise." Special provisions decreed that goods purchased outside the ordinary channels must be kept separate and so advertised; decreed that delivery costs must be based on regular transportation tariffs established by the State Railroad Commission; decreed that an allowance for proprietors services must be included in labor costs. Statutes of the various states vary in respect to mark-up provisions. California and Michigan prohibit merely sales below cost as defined, with no specified minimum mark-up; many specify 2% wholesale and 6% retail minimum mark-ups; Minnesota specified 10% retail minimum mark-up--the practice was not uniform. The state laws specify that "cost" including cost of merchandise plus cost of doing business, shall be established by a survey of the trade affected.

The problems relating to "cost" as created by these Acts are not so great as those associated with other

current legislation, such as the Robinson-Patman Act. Most of the laws use invoice cost or manufacturers' list price for the cost base; a permanent record of invoices must be maintained to substantiate the figures used. Additions to the cost base offer a problem only when the particular state law specifies total overhead and when total overhead is a significant figure under the law. In such a case, the accountant must use care and follow the general practices of the industry in determining the amounts to be included in the total overhead. The procedure for distribution-cost accounting is a new field involving untried methods of accounting. Until adequate precedent has been established, conservative practice should be followed in the assignment of the overhead where required by the law.

The Unfair Practice Acts have escaped the public attention until the recent activity of Anti-trust division of the Attorney General focused attention upon several states. Food prices in Philadelphia and Cleveland have been investigated for presentation before the federal grand juries, and indictments have been secured against baking concerns on the East Coast for conspiring to fix and control prices. Moving West, the anti-trust drive struck in Colorado, securing convictions because of the manner in which the Food Distributors Association administered the mark-ups under the Unfair Practices Act. Continuing to the

Coast, representatives from the Attorney General's Department have already presented evidence of price conspiracy in staple groceries before the federal grand jury in Seattle. Currently the Department of Justice is checking on enforcement methods as practiced under the California Fair Trade and Unfair Practices Act in Los Angeles and San Francisco. The food and grocery associations apparently are the chief offenders. The law specifically states "costs" according to the Unfair Practice Acts should result from a survey by the affected trade, but this provision has not had the proper consideration. The food and grocery men originally were most anxious to spread this type of legislation in preference to the Fair Trade Act. Having secured the cooperation of interested dealers and associations this legislation has been enacted to cover many principal markets. It is regrettable that they have been unable to administer the law with discretion.

[illegible]

Conclusion

Currently Fair Trade is in a vulnerable position. Poor performance in many fields and utter lack of control in the liquor industry have created unfavorable reaction to the effectiveness of enforcement. The champion of Fair Trade, the National Association of Retail Druggists, is still vigorously defending the movement throughout the country. At present, plans are being formulated to enroll the remaining states in Fair Trade so that all forty-eight states are solidly behind it.

The attacks which have been leveled at Fair Trade of late are substantial. The Assistant Attorney General, Thurman Arnold, had recommended to the TNEC that the Miller-Tydings Bill should be repealed, and in its final report to Congress the Committee has recommended that the law be removed from the statutes. The Druggists' Association has replied to the charge and the fight on the issue should be vigorous. It is believed that the Department of Justice is contemplating anti-trust action against certain Fair Trade practices just as at present the Unfair Practices Laws are the object of scrutiny. The Federal Trade Commission has been intervening in certain practices. Legal disputes as to what constitutes "free and open competition" are anticipated.

In the meantime, the consumer who pays the added

cost, sits on the sidelines, wondering whether the future holds a period of unbridled competition or some type of "civilized" price control.

APPENDIX

Appendix A

California Fair Trade Act

An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

The people of the State of California do enact as follows:

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.
2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by the vendor, or by the vendee.
3. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

    1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.
    2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.
    3. By any officer acting under the orders of any court. (Enacted, 1931, ch. 278, Stats. of 1931, effective August 14, 1931).

Section $1\frac{1}{2}$.

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of

this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (Added, 1933, ch. 260 Stats of 1933, effective August 21, 1933).

Section 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices. (Enacted, 1931, ch. 278).

Section 3. The following terms, as used in this act, are hereby defined as follows:
"Producer" means grower, baker, maker, manufacturer or publisher.
"Commodity" means any subject of commerce. (Enacted, 1931, ch. 278.)

Section 4. If any provision of this act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 5. This act may known and cited as the "Fair Trade Act." (Enacted, 1931, ch. 278.)

Section 6.

All the provisions of this act shall extend to any commodity sold through vending equipment. If such vending equipment bears the trade-mark, brand or name of the producer or owner of such commodity and if such commodity is in fair and open competition with commodities of the same general class produced by others. (Added, 1937, ch. 843, Stats. of 1937, effective August 26, 1937).

(Note .* Chapter 843, Statutes of 1937, which added section 6, also had the following section:)

Section 2. It is hereby declared to be the intent of the Legislature in adding section 6 to the Fair Trade Act that, if said section 6 should be held to be unconstitutional, the remainder of the act shall be unaffected thereby and shall continue in full force and effect.

Appendix B

Colorado

Based on the suggested model form of the National Association of Retail Druggists

An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:

a. That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

b. That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

a. In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer of

such commodity, or to the distributor, from whom the same was purchased, prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price.

b. When the trade mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof.

c. When the goods are damaged or deteriorated in quality and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements.

d. By any officer acting under the orders of any court.

Section 2. This act shall not apply to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale prices.

Section 3. The following as used in this act, are hereby defined as follows:

a. "Commodity" means any subject of commerce.

b. "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

c. "Wholesaler" means any person selling a commodity other than a producer or retailer.

d. "Retailer" means any person selling a commodity to consumers for use.

e. "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a public trust, or any unincorporated organization.

Section 4. Wilfully and knowingly advertising, offering

for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Section 5. If any provision of this Act is declared unconstitutional, it is the intention of the Legislature that the remaining portions thereof shall not be affected, but that such remaining portions remain in full force and effect; but no part of this act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this state.

Section 6. This Act may be known and cited as the "Fair Trade Act."

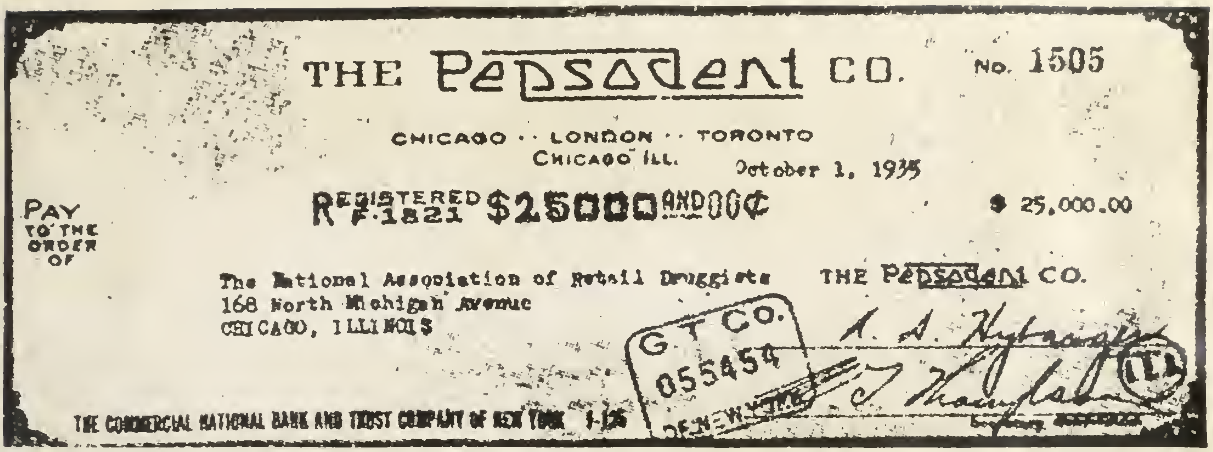
Section 7. The General Assembly hereby finds, determines and declares this Act to be necessary for the immediate preservation of the public peace, health and safety.

Section 8. In the opinion of the General Assembly an emergency exists; therefore, this Act shall take effect and be in force from and after its passage.

(House Bill No. 513, Regular Session 1937, approved March 15, 1937).

Appendix C

The Pepsodent Check



Photostatic copy of the check sent by the Pepsodent Company to the National Association of Retail Druggists to help finance defense of Fair Trade legislation in the courts. This donation was made after the California druggists had refused to sell products of the company as the result of company cancellation of Fair Trade contracts.

Copy for Gillette Safety Razor Company

RETAILER'S RESALE PRICE CONTRACT
FORM R 100

INSTRUCTIONS

This contract should be signed in duplicate by the Retailer. Both copies should then be sent to the Gillette Safety Razor Company, Boston, Massachusetts. Upon approval, they will then be executed by Gillette and one copy sent to the Retailer.

GILLETTE SAFETY RAZOR COMPANY
Retailer's Resale Price Contract for Gillette Products
MEMORANDUM OF AGREEMENT

AGREEMENT made in the State of Massachusetts by and between Gillette Safety Razor Company, a Delaware corporation having its principal place of business in Boston, Massachusetts, hereinafter called "Gillette", and the undersigned Retailer,

WITNESSETH:

WHEREAS, Gillette is engaged in the business of producing and selling certain safety razors, safety razor blades, packets of safety razor blades, and sets of safety razors and blades as well as certain other merchandise (hereinafter called "trade-marked commodities"), which bear the name of Gillette or trade-marks or brands owned by Gillette, and which commodities are sold throughout the United States in free, fair and open competition with commodities of the same general class produced by others; and

WHEREAS, statutes have been enacted in many states of the United States, hereinafter called "Fair Trade Acts", which legalize agreements prescribing minimum prices for the resale of such trade-marked commodities, and the parties hereto desire to avail themselves of the benefits of such statutes in order to safeguard the public and themselves against unfair and discriminatory practices, in accordance with the declared intent of such statutes, and to prevent damage to the trade-marks, brands, or name of Gillette through such practices;

NOW THEREFORE, pursuant to said Fair Trade Acts and to the Sherman Anti-Trust Act of the United States, as amended, and in consideration of the mutual promises hereinafter contained and of such sales of trade-marked commodities, if any, as may hereafter be sold by Gillette to the Retailer, it is agreed as follows:

(1) Retailer will not (except as provided in Paragraph (6) hereof) directly or indirectly advertise, offer for sale, or sell any of said trade-marked commodities in any state in which he regularly does business and in which a Fair Trade Act shall be in effect, at less than the minimum retail prices at that time stipulated for such state by Gillette pursuant to this contract.

(2) The minimum retail prices now stipulated by Gillette for the trade-marked commodities in the state or states in which the Retailer regularly does business are those now or hereafter designated in Schedule A to this contract.

The word "packet" as used herein and in Schedule A shall mean the packet of 2, 5 or 10 blades, as the case may be, together with any blades or other merchandise physically attached thereto or included therewith when sold by Gillette, but shall not mean any packets of blades included with razor sets unless sold separately from such sets.

(3) Gillette, at any time and from time to time, upon notice to Retailer, may alter Schedule A by including additional trade-marked commodities, excluding any trade-marked commodities which may theretofore have been included, and changing the minimum retail price of any trade-marked commodities which are included.

(4) For the purpose of preventing evasions of the resale price restrictions imposed by this contract, and in order to express the intent of the parties as to the meaning of the word "price" as used in Article 2 hereof, it is agreed by the parties hereto that (a) the offering or giving of any article of value in connection with the sale by the Retailer of any of the trade-marked commodities; (b) the offering or making of any concession of any kind whatsoever (whether by the giving of coupons, trading stamps or otherwise), in connection with any such sale, or (c) the sale or offering for sale of any of the trade-marked commodities by the Retailer in combination with any other merchandise shall constitute a breach by the Retailer of Article (1) of this agreement.

(5) Retailer will not, where the law permits such restriction, sell any of the trade-marked commodities except to consumers for use.

(6) Retailer may sell said trade-marked commodities at less than the stipulated prices in such cases as are expressly permitted by the Fair Trade Act of the state where such trade-marked commodities are to be sold, but the Retailer agrees in each such case, at least ten days before selling or offering for sale said trade-marked commodities at less than the stipulated price, to offer in writing to sell said commodities to Gillette at the original invoice price at which the Retailer purchased said trade-marked commodities.

(7) In case of any actual or threatened violation of this agreement by the Retailer, Gillette shall be entitled to an injunction and damages, and in addition, and as a part of such damages, to the sum of Two Hundred and Fifty ($250) Dollars for counsel fees for instituting suit, and to the further sum of Two Hundred and Fifty ($250) Dollars for counsel fees for prosecuting the suit in the event that it is not settled before trial.

(8) Gillette agrees to continue the manufacture of safety razor blades during the term of this agreement. It also agrees to use its best efforts to have other contracts of similar tenor to this signed by other retailers in the state or states where the Retailer does business.

(9) This agreement may be terminated by either party on ten days' written notice to the other. No such termination shall affect any right given to Gillette by a Fair Trade Act against the Retailer if the Retailer thereafter wilfully or knowingly advertises, offers for sale, or sells any of the trade-marked commodities at less than the price stipulated in any other contract entered into by Gillette pursuant to the provisions of said Fair Trade Act. Nothing in this contract shall authorize sales of trade-marked commodities by the Retailer in a state or for transportation to a state in which the Retailer does not regularly do business, at less than the prices stipulated by Gillette in resale price contracts made with retailers in that state.

(10) Any notice given under this agreement shall be sufficiently given by delivering the same personally to the party hereto to whom it shall be addressed or by mailing the same in a sealed postpaid envelope addressed to such party at its address given below.

(11) This agreement shall apply only to sales of trade-marked commodities by the Retailer in a state, or for transportation to a state, in which agreements of this description are now or may hereafter become lawful with respect to intrastate transactions, and if any term of this agreement is unlawful in any such state, such unlawful term shall be excluded from this contract and the remainder of the contract shall be considered in effect, it being the intention of the parties to have all provisions of this contract to that extent separable.

(12) This agreement shall become effective upon execution by the parties.

IN WITNESS WHEREOF, the parties hereto have executed this agreement on..

Retailer..

Paste Store Label here.

Address..

GILLETTE SAFETY RAZOR COMPANY
Boston, Mass.

by..

SCHEDULE A

Stipulated Minimum Retail Prices

STATE OF NEW YORK

October 25, 1937

BLADES

Gillette Blue Blades	packets of 2 blades	$ .10
Gillette Blue Blades	packets of 5 blades	.24
Gillette Blue Blades	packets of 10 blades	.47
Gillette Blue Blades	50 blade units	2.35
Standard Probak Blades	packets of 2 blades	.10
Standard Probak Blades	packets of 5 blades	.24
Standard Probak Blades	packets of 10 blades	.47
Valet AutoStrop Blades	packets of 5 blades	.24
Valet AutoStrop Blades	packets of 10 blades	.47

RAZORS

Gillette Special Set	$ .25
Red and Black Set	.49
Blue and Gold Special Set	.59
Sheraton Set	.98
Bostonian Set	.89
Aristocrat Set	3.79
Valet AutoStrop Prosperity Special	.98

GILLETTE BRUSHLESS SHAVING CREAM .... $ .25

SPECIAL COMBINATIONS

Gillette Gift Set No. 1	$ .98
Gillette Gift Set No. 2	1.39
Gillette Gift Set No. 3	1.97
Gillette Gift Set No. 4	2.48
Gillette Gift Set No. 5	5.00
Gillette Gift Set No. 6	7.23

Appendix E

Sample Resale Price Contract between Manufacturer and Wholesaler

Copy for Gillette Safety Razor Company

WHOLESALER'S RESALE PRICE CONTRACT
FORM W 100
REVISED MARCH 1, 1939

INSTRUCTIONS

This contract should be signed in duplicate by the Wholesaler. Both copies should then be sent to the Gillette Safety Razor Company, Boston, Massachusetts. Upon approval, they will then be executed by Gillette and one copy sent to the Wholesaler.

GILLETTE SAFETY RAZOR COMPANY

Wholesaler's Resale Price Contract for Gillette Products

MEMORANDUM OF AGREEMENT

Made in the City of Boston in the State of Massachusetts by and between Gillette Safety Razor Company, a Delaware corporation, hereinafter called the "Manufacturer," and the undersigned wholesaler, hereinafter called the "Wholesaler."

WHEREAS, the Manufacturer is the producer or the distributor of various Commodities and the Wholesaler is engaged in the sale of such Commodities at wholesale in various states which have enacted fair trade acts, so called, and the Manufacturer and the Wholesaler desire to avail themselves of the provisions of such fair trade acts and of the fair trade acts of such other states as shall hereafter enact such statutes;

NOW THEREFORE, THIS AGREEMENT WITNESSETH: That the parties hereto, for and in consideration of the premises, the mutual undertakings and agreements herein contained and such sales by the Manufacturer and purchases by the Wholesaler as shall be made of the Products during the period while this agreement shall be in force, do hereby undertake and agree as follows:

1. The word "Commodities" as used in this agreement is hereby defined to mean commodities which bear, or the label or container of which bears, the trade-mark, brand or name of the Manufacturer, and which are in free, fair and open competition with commodities of the same general class produced or distributed by others.

The word "Products" as used in this agreement is hereby defined to mean the Commodities which are specified in Schedule A hereto attached and made part hereof and such Commodities as may be added to those specified in said Schedule A by the Manufacturer as hereinafter provided.

2. Except in the cases specified in the fair trade act of the state in which such resale may be made as those in which the Products may be resold in such state without reference to this agreement, the Wholesaler will not at any time advertise, or offer for sale, or sell any of the Products to any buyer in any state in which at the time of such resale a fair trade act shall be in effect at less than the minimum wholesale price at that time stipulated therefor in such state by the Manufacturer.

3. The minimum wholesale prices now stipulated by the Manufacturer for the Products in various states are those designated in said Schedule A.

It is, however, understood and agreed:

(A) That by notice given to the Wholesaler as hereinafter provided, the Manufacturer may, from time to time, (a) add one or more Commodities to those specified in said Schedule A, (b) remove any one or more of the Commodities theretofore included in Schedule A and (c) change the minimum wholesale price for any one or more of the Products;

(B) That each addition, removal or change to or in said Schedule A shall be effective at such time as shall be designated by the Manufacturer in the notice thereof;

4. The Manufacturer agrees that in the event that, pursuant to any agreement similar to this one, it shall stipulate a minimum wholesale price for any Product in any given state which shall be different from such minimum price at the time stipulated for such Product under this agreement in such state, it will give prompt notice of such fact to the Wholesaler, and the parties agree that such different minimum price shall be effective under this agreement in such state at the time designated by the Manufacturer.

5. For the purpose of preventing evasions of the resale price restrictions imposed by this contract, and in order to express the intent of the parties as to the meaning of the word "price" as used in Article 2 hereof, it is agreed by the parties hereto that (a) the offering or giving of any article of value in connection with the sale by the Wholesaler of any of the Products; (b) the offering or making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise), in connection with any such sale, or (c) the sale or offering for sale of any of the Products by the Wholesaler in combination with any other merchandise shall, unless specifically authorized by the Manufacturer, constitute a breach by the Wholesaler of Article 2 of this agreement.

6. This agreement may be terminated by either party hereto on ten days' written notice to the other. No such termination shall affect any right given to the Manufacturer by a Fair Trade Act against the Wholesaler if the Wholesaler thereafter wilfully or knowingly advertises, offers for sale, or sells any of the Commodities at less than the price stipulated in any other contract entered into by the Manufacturer pursuant to the provisions of said Fair Trade Act.

7. In case of any actual or threatened violation of this agreement by the Wholesaler, the Manufacturer shall be entitled to an injunction and damages and in addition and as a part of such damages to the sum of $250 for counsel fees for instituting suit, and to the further sum of $250 for counsel fees for prosecuting the suit in the event that it is not settled before trial.

8. Any notice given under any of the provisions of this agreement shall be well and sufficiently given by delivering the same personally to the party hereto to whom it shall be addressed or by mailing the same in a sealed postpaid envelope addressed to such party at its address given below.

9. It is agreed by the parties hereto that this agreement shall apply to resales of the Products, or any of them, only at such times as agreements of the character of this agreement shall be lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the Products in question are to be transported for resale.

IN WITNESS WHEREOF, the parties hereto have executed this agreement on...

Wholesaler..

Address..

GILLETTE SAFETY RAZOR COMPANY
MANUFACTURER

by..

SCHEDULE A

Stipulated Minimum Wholesale Prices

March 1, 1939

BLADES

Gillette, Probak & Valet AutoStrop Blades	in cartons of 100 blades	$ 3.68
Thin Gillette Blades in cartons of 50 packages of 4 blades each (200 blades)		3.68
Thin Gillette Blades in cartons of 25 packages of 8 blades each (200 blades)		3.50

RAZORS

Gillette Special Set	in cartons of 20 sets	$ 3.68
Red & Black Set	in cartons of 10 sets	3.68
Tech Razor Set	in cartons of 10 sets	3.68
Blue & Gold Special Set	per dozen	5.15
Senator Set	in cartons of 12 sets	5.75
Sheraton Set	in cartons of 10 sets	7.36
Bostonian Set	in cartons of 10 sets	6.00
Aristocrat Set	per dozen	32.16
Valet AutoStrop Prosperity Special Set	in cartons of 10 sets	7.36

GILLETTE BRUSHLESS SHAVING CREAM

Small Size Tube (1 oz.)	in cartons of 36 tubes	$2.55
Medium Size Tube (2½ oz.)	in cartons of 12 tubes (1 tube free)	2.00
Giant Size Tube (5 oz.)	in cartons of 12 tubes	2.95

SPECIAL COMBINATIONS

Gillette Gift Set No. 1	per dozen	$ 8.83
Gillette Gift Set No. 2	per dozen	11.40
Gillette Gift Set No. 3	per dozen	17.45
Gillette Gift Set No. 4	per dozen	21.86
Gillette Gift Set No. 5	per dozen	42.98
Gillette Gift Set No. 6	per dozen	62.65

DRY SHAVERS

Gillette Dry Shaver	per Dry Shaver	$13.00

Appendix F

Sample Stipulated Minimum Retail Price Announcement to the Retail Trade by the Manufacturer

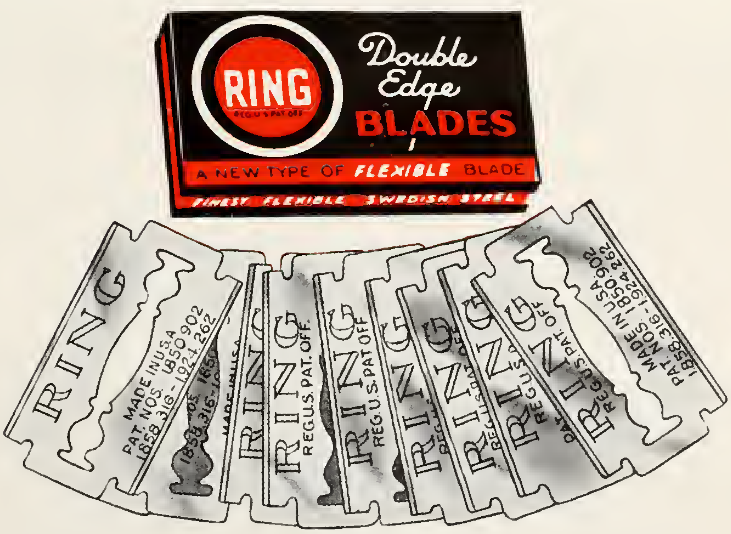
COLTON RAZOR BLADE COMPANY

80 DORCHESTER AVE., BOSTON, MASSACHUSETTS

STIPULATED MINIMUM RETAIL PRICES
March 1, 1941

Gentlemen:—

Inasmuch as other dealers in your state have already executed Retail Resale Price Contracts for Ring Double Edge Razor Blades, we have taken liberty of establishing our products on Fair Trade effective immediately.



STIPULATED MINIMUM RETAIL PRICES

Ring Blades — Packets of 20 Blades	**$ .25**
Ring Blades — Packets of 10 Blades	**.15**

(If the blades listed above are sold other than in the containers in which they are packed by Colton then the stipulated minimum retail price shall be $.015 per blade.)

COLTON RAZOR BLADE COMPANY

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